INDEX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-692

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

DONALD SOMERVILLE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

DOCKET ENTRIES

In The District Court For The Northern District Of Illinois, Eastern Division:

March 21, 1969

Petition for a writ of habeas corpus filed.

March 27, 1969

Notice of filing petition for a writ of habeas corpus by Donald Somerville.

April 4, 1969

Order directing the State of Illinois to file an answer to petition for a writ of habeas corpus on or before April 14, 1969.

April 11, 1969

Return to rule to show cause why a petition for a writ of habeas corpus should not be granted filed by respondent, the State of Illinois.

April 16, 1969

Order and memorandum opinion denying petition for a writ of habeas corpus.

April 17, 1969

Petition by Donald Somerville for leave to file a reply and brief in response to return to rule to show cause.

Order granting Donald Somerville 10 days to which to file reply and brief. Order continuing generally the motion of Donald Someville to vacate order dismissing petition for a writ of habeas corpus.

April 28, 1969

Brief in support of petition for a writ of habeas corpus filed by Donald Somerville.

April 30, 1969

Order denying motion to vacate order dismissing petition for a writ of habeas corpus.

May 9, 1969

Notice of appeal filed by Donald Somerville.

In The United States Court of Appeals For The Seventh Circuit:

July 30, 1969

Record on appeal filed.

April 15, 1970

Oral arguments heard.

May 14, 1970

Opinion and judgment affirming order dismissing petition for writ of habeas corpus.

May 28, 1970

Petition for rehearing *en banc* filed by Donald Somerville.

August 19, 1970

Order entered denying petition for rehearing.

In The Supreme Court Of The United States:

November 16, 1970

Petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit filed.

April 5, 1971

Petition for a writ of certiorari granted, judgment of the United States Court of Appeals for the Seventh Circuit vacated, and case remanded for reconsideration in light of United States v. Jorn, 401 U.S. 470 (1971), and Downum v. United States, 372 U.S. 735 (1963).

In The United States Court Of Appeals For The Seventh Circuit:

April 7, 1971

Filed Supreme Court order vacating judgment of May 14, 1970.

May 19, 1971

Order entered that each party file supplementary briefs addressed to the application, if any, of United States v. Jorn to the instant appeal.

July 20, 1971

Opinion and judgment reversing order dismissing petition for writ of habeas corpus.

August 3, 1971

Petition for rehearing *en banc* filed by the State of Illinois.

September 3, 1971

Petition for rehearing denied.

In The Supreme Court Of The United States:

November 24, 1971

Petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit filed by the State of Illinois.

March 20, 1972

Petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit granted.

[1] **PETITION FOR WRIT OF HABEAS CORPUS**
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Persons In State Custody

UNITED STATES OF AMERICA ex rel.
RONALD SOMERVILLE, No. 64649
Full Name and Prison Number (if any) of Petitioner

vs.

STATE OF ILLINOIS
Name of Respondent

JUDGE DECKER
Case No. 69 C 614
(To be Supplied by the Clerk of the District Court)

Instructions—Read Carefully

In order for this petition to receive consideration by the District Court, it shall be in writing (legibly handwritten or typewritten), signed by the petitioner and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary petitioner may finish his answer to a particular question on the reverse side of the page or on an additional blank page. Petitioner shall make it clear which question any such continued answer refers to.

Since every petition for habeas corpus must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should, therefore, exercise care to assure that all answers are true and correct.

If the petition is taken in forma pauperis it shall include an affidavit (attached at the back of the form) setting forth information which establishes that petitioner

will be unable to pay the fees and costs of the habeas corpus proceedings. When the petition is completed, the original and one copy shall be mailed to the Clerk of the District Court for the Northern District of Illinois.

[7] 1. Place of detention: Illinois State Penitentiary, Stateville (Joliet) Illinois.

2. Name and location of court which imposed sentence: Circuit Court of Cook County, Illinois, Criminal Division, 26th Street and California Avenue, Chicago, Illinois.

3. The indictment number or numbers (if known) upon which, and the offense or offenses for which, sentence was imposed:

(a) 65-3017 (Knowingly obtaining unauthorized control over stolen property).

(b)

(c)

4. The date upon which sentence was imposed and the terms of the sentence:

(a) Not less than 2 years or more than 10 years.

(b)

(c)

5. Check whether a finding of guilty was made

(a) after a plea of guilty

(b) After a plea of not guilty X

(c) after a plea of nolo contendre

6. If you were found guilty after a plea of not guilty, check whether that finding was made by

(a) a jury X

(b) a judge without a jury

7. Did you appeal from the judgment of conviction or the imposition of sentence? yes

8. If you answer "yes" to (7), list

(a) the name of each court to which you appealed:

[8] i. Appellate Court of Illinois, First District.

ii. Supreme Court of Illinois (Petition for Leave to Appeal).

iii. Supreme Court of the United States (Petition for Writ of Certiorari).

(b) the result in each such court to which you appealed:

i. Affirmed.

ii. Denied.

iii. Denied.

(c) the date of each such result:

i. October 16, 1967.

ii. January 17, 1968.

iii. October 14, 1968.

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. 88 Ill. App. 2d 212, 232, N. E. 2d 115.

ii.

iii. 89 S. Ct. 81 (Oct. 14, 1968).

9. If you answered "no" to (7), state your reasons for not so appealing:

(a)

(b)

(c)

[9] 10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Petitioner was twice placed in jeopardy for the same offense in contravention of his rights arising from the Fifth Amendment of the Constitution of

the United States made applicable to the States through the Fourteenth Amendment to the Constitution of the United States.

(b)

(c)

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Your petitioner was originally indicted on March 19, 1964 in case no. 64-916. On November 1, 1965, a jury was impanelled and sworn and jury trial was commenced on this indictment. On November 2, 1965 the State's Attorney moved for a mistrial because, in his opinion, the indictment did not allege an offense. Over objections of the defense a mistrial was granted. At no time prior to this action had the defense attacked the validity or sufficiency of the indictment or the allegations therein contained. On November 3, 1965, your petitioner was again indicted in Case No. 65-3017 for the same offense. Petitioner moved to dismiss the indictment on the grounds that the prosecution and trial commenced in connection with indictment No. 64-916, constituted a bar to prosecution on the subsequent indictment. This motion of petitioner was denied.

[10] (b)

(c)

12. Prior to this petition have you filed with respect to this conviction:

(a) any petition in a state court under the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat. ch. 38, sec. 122? No. (The issue raised herein having been presented to and decided and rejected by the Illinois courts).

(b) any petitions in a state court by way of statutory coram nobis. Ill. Rev. Stat. ch. 110, sec. 72? No.

(c) any petitions in state or federal courts for habeas corpus? No.

(d) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No.

(e) any other petitions, motions or applications in this or any other court? No.

• • •

[12] 14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed? Yes.

15. If you answered "yes" to (14), identify:

(a) which grounds have been previously presented:

i. Petition was twice placed in jeopardy for the same offense in contravention of his rights arising from the Fifth Amendment of the Constitution of the United States made applicable to the States through the Fourteenth Amendment to the Constitution of the United States.

ii.

iii.

(b) the proceedings in which each ground was raised:

i. Petition for a Writ of Certiorari filed in the United States Supreme Court.

ii.

iii.

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) None

(b)

(c)

[13] 17. Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? Yes

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of confiction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitioner, motions or applications with respect to this conviction which you filed?

18. If you answered "yes" to one or more parts of (17), list

(a) the name and address of each attorney who represented you:

i. Lawrence Lazar, 33 No. La Salle Street, Chicago, Illinois.

ii. Julius Lucius Echeles, 30 No. La Salle St., Chicago, Ill.

iii. Bellows, Bellows & Magidson, 10 So. La Salle St., Chicago, Ill.

iv. Charles A. Bellows, Jason E. Bellows and Sherman C. Magidson, 10 S. La Salle St., Chicago, Ill.

(b) the proceedings at which each such attorney represented you:

i. Trial.

ii. Appellate Court of Illinois (appeal).

iii. Illinois Supreme Court (Petition for leave to appeal).

iv. The Supreme Court of the United States (Writ of certiorari).

[14] 19. If you are seeking leave to proceed in forma pauperis, have you completed the sworn affidavit setting forth the required information (see instructions, Page 1 of this form)? Not applicable.

DONALD SOMERVILLE, No. 64649
Petitioner

by /s/ MARTIN GERBER
His Attorney

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

MARTIN S. GERBER, being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

/s/ Martin S. Gerber
Martin S. Gerber
Attorney for Petitioner
39 South La Salle Street
Andover 3-6051
Chicago, Illinois 60603

SUBSCRIBED AND SWORN to before me this 20th day of March, 1969.

/s/ Esther V. Gutenberg
Notary Public

my commission expires
May 4th, 1972

[17] (CAPTION OMITTED)
(Order of April 14, 1969:)

Under 28 U.S.C. § 2243, a writ of habeas corpus shall be answered "within three days unless for good cause additional time . . . . is allowed." Since petitioner's request was filed on March 21, 1969, respondent shall have until April 14, 1969 to answer.

[18] (CAPTION OMITTED)

RETURN TO RULE TO SHOW CAUSE

Now come the PEOPLE OF THE STATE OF ILLINOIS, respondent herein, by their attorney WILLIAM J. SCOTT, Attorney General of the State of Illinois, and for their return to the rule to show cause why a writ of habeas corpus should not issue states as follows:

1. The true cause of petitioner's incarceration in the Illinois State Penitentiary is a lawful conviction in the Circuit Court of Cook County, Illinois for the crime of theft, Ill. Rev. Stats., Ch. 38, § 16-1, exceeding $150.00 in value. After a finding of guilty made by a jury, petitioner was sentenced to a penitentiary term of not less than 2 years nor more than 10 years.

2. There is no dispute about the facts which give rise to the petitioner's claim of double jeopardy. The petitioner was originally charged with a violation of Ill. Rev. Stats. Ch. 38, 16-1 (d), (the receiving of stolen property, subsection of the Illinois theft statute). The indictment did not allege an intent to permanently deprive the owner of possession and therefore did not charge an offense under Illinois law. People v. Harris, 394 Ill. 325, 327, 68 N.E. 2d 728 (1946); People v. Somerville, 88 Ill. App. 2d 212, 232 N.E. 2d 115 (1967).

After a jury was empaneled, but before any evidence was heard, the trial court, on the motion of the state, over a token objection by defense counsel, dismissed the indictment since it was fatally defective.

Petitioner was then properly indicted. He made the same double jeopardy argument in the Illinois trial court as he now makes in this court. The argument was rejected and petitioner was tried, convicted, and sentenced.

Petitioner renewed his argument in the Illinois Appellate Court and it was rejected. People v. Somerville, 88 Ill. App. 2d 212, 232 N.E. 2d 115 (1967). The Supreme Court of Illinois denied a petition for leave to appeal and the United States Supreme Court denied a petition for certiorari, 393 U.S. 823 (1968). Both petitions renewed the claim of double jeopardy.

• • •

[26] (CAPTION OMITTED)

MEMORANDUM OPINION

Charging statutory theft, petitioner's original indictment failed to allege that he intended permanently to deprive the owner of possession of the stolen property. After a jury was empaneled but before any evidence was heard, the trial court dismissed the indictment at the prosecutor's request. Reindicted for the same offense, petitioner was subsequently convicted and sentenced to the penitentiary. The instant habeas corpus suit asserts that petitioner was subject to double jeopardy, in violation of the state and federal constitutions.

Denying petitioner's direct appeal, the Illinois Appellate Court correctly held that, under state law, petitioner was not initially placed in jeopardy because the indictment

did not state an offense. People v. Somerville, 88 Ill. App. [27] 2d 212 (1967). A theft complaint is fatally defective if it fails to allege an intent to deprive or to defraud. Compare People v. Greene, 92 Ill. App. 2d 201 (1968); People v. Billingsley, 67 Ill. App. 2d 292 (1966).

Similarly, petitioner's federal claim lacks merit because the double jeopardy clause of the Fifth Amendment does not apply to the states through the Fourteenth Amendment. Palko v. Connecticut, 302 U.S. 319 (1937); compare Benton v. Maryland, No. 201, O.T. (1968). Furthermore, even under the United States Constitution, the original indictment did not subject petitioner to jeopardy. Except in exceptional circumstances, United States v. Ball, 163 U.S. 662 (1896); jeopardy does not attach to a defective indictment because the court lacks jurisdiction. Any verdict would thus be a nullity. See, e.g., Johnsen v. United States, 41 F. 2d 44 (9th Cir. 1930); Haugen v. United States, 153 F. 2d 850 (9th Cir. 1946). See also United States v. Ewell, 383 U.S. 116, 124 (1966). Moreover, the plea of former jeopardy is not available because the earlier dismissal was not on the merits. See Lopez v. United [28] States, 17 F. 2d 462 (1st Cir. 1926); compare Head v. Hunter, 141 F. 2d 449 (10th Cir. 1944).[1]

Accordingly, I have entered an order today dismissing the complaint for failure to state a cause of action.

ENTER:

BERNARD M. DECKER,
United States District Judge.

DATED: April 16, 1969.

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1. In fact, when "manifest necessity" requires the premature termination of a trial, the defendant remains subject to subsequent prosecution even if the prosecutor's conduct may have contributed to the dismissal. See Gori v. United States, 367 U.S. 364 (1961); compare United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824).

[31] PETITION FOR LEAVE TO FILE REPLY AND BRIEF IN RESPONSE TO THE ARGUMENT AND BRIEF FILED BY STATE OF ILLINOIS PURSUANT TO RULE TO SHOW CAUSE

TO:

THE HONORABLE BERNARD M. DECKER,
JUDGE OF SAID COURT:

Petitioner, Donald Somerville, by his attorney, Martin S. Gerber, moves the court for an order granting leave to file, on or before May 9, 1969, a brief in response to the answer and supporting memoranda of the Attorney General of the State of Illinois to the rule, heretofore entered on April 4, 1969, to show cause why the Writ of Habeas Corpus filed by your petitioner should not issue. In support of this motion, petitioner represents as follows:

(1) The petitioner's petition for the issuance of a Writ of Habeas Corpus, was filed on March 21, 1969.

[32] (2) On April 4, 1969, the court entered an order upon the State of Illinois to show cause why the said writ should not issue.

(3) On, to-wit, April 11, 1969, the State of Illinois filed with this court its answer and supporting memorandum to the above mentioned rule to show cause.

(4) Said answer of the State of Illinois cites to the court many cases suggesting the applicability and relevancy of said cases to the issues raised by the petitioner for the Writ of Habeas Corpus herein.

(5) This petitioner would like an opportunity to file with this court a detailed brief addressed to the issues raised in the petition for Writ of Habeas Corpus, with

particular emphasis upon a direct response to the memoranda of law and arguments urged by the State of Illinois in its answer aforementioned.

(6) Your petitioner therefore respectfully requests that the court grant to him twenty (20) days in which to file his said brief, the same period heretofore afforded by the court to the State of Illinois to file its answer.

(SUBSCRIPT OMITTED)

[34] Order of April 17, 1969:

"Petitioner given leave to file Reply and Brief in response to argument and brief filed by State of Illinois in 10 days.

Motion of Petitioner to vacate order of dismissal continued generally."

[35] (CAPTION OMITTED)

BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

STATEMENT OF FACTS

Petitioner and a co-defendant were originally indicted by the Cook County Grand Jury in March, 1964 for receiving stolen property on March 24, 1963. On November 1, 1965, the case was called for trial and a jury was selected and sworn. The following day the State moved to nolle prosse the indictment, urging to the court an argument that the indictment did not allege that defendants intended to deprive the owner permanently of the use of the property allegedly stolen. The indictment was at no time attacked by defendants as defective. Without the consent and over objection of defendants, the jury already selected and sworn, was discharged and the indictment was dismissed.

On November 3, 1965, a second indictment was returned alleging the same crime but including additional language charging defendants intended to deprive the owner permanently of the use of the property. Petitioner moved [36] to dismiss this indictment on the grounds that he had already been placed in jeopardy for the alleged offense when the first jury had been selected and sworn. Defendant's motion was denied.

A jury was again selected and sworn. Following trial, the second jury returned a verdict of guilty and, upon a judgment of guilty, petitioner was sentenced to a term of ten years in the penitentiary.

Defendant's conviction was affirmed by the Illinois Appellate Court and his Petitions for Leave to Appeal to the Illinois Supreme Court and for a Writ of certiorari were each and both denied.

* * *

[51] Order of April 30, 1969:

> "Downum v. United States, 372 U. S. 734 (1963), decided that jeopardy attaches when, a jury having been impaneled, the prosecution is unprepared to present its evidence. The defendant, in that case, was prepared to go to trial under a valid indictment. In contrast, the instant case involves a defective indictment. Petitioner's motion to vacate is therefore denied. For the reasons expressed in the April 16, 1969, memorandum opinion the cause remains dismissed."

[52] (CAPTION OMITTED)

NOTICE OF APPEAL

Notice is hereby given that the petitioner, Donald Somerville, will and hereby does, appeal from the order of April 16, 1969, dismissing the complaint for failure to state a cause of action, and from the order of April 30, 1969, denying petitioner's Motion to Vacate its order of Dismissal.

(SUBSCRIPT OMITTED)

OPINION OF THE COURT OF APPEALS— MAY 14, 1970

IN THE

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

September Term, 1969—April Session, 1970

No. 17817
UNITED STATES OF AMERICA,
ex rel DONALD SOMMERVILLE,
Petitioner-Appellant,
v.
STATE OF ILLINOIS,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 14, 1970

Before MAJOR and CASTLE, *Senior Circuit Judges,* and FAIRCHILD, *Circuit Judge.*

CASTLE, *Senior Circuit Judge.* Donald Sommerville, petitioner-appellant, prosecutes this appeal from the District Court's Dismissal of his petition for habeas corpus which asserted, in substance, that he was being held in custody unlawfully pursuant to a sentence imposed following his state-court conviction in a trial which subjected him to double jeopardy in violation of the Fifth Amendment. The District Court dismissed the petition for failure to state a claim upon which relief could be granted. We affirm.

In November 1965, following a trial in the Circuit Court of Cook County, Illinois, petitioner was convicted by a jury under a November 3, 1965, indictment charging theft[1] and was sentenced to the penitentiary for not less than two nor more than ten years. Upon his arraignment on this indictment the petitioner had filed a motion to dismiss the indictment on the grounds that he had previously been indicted on March 19, 1964, for the same offense, a jury impaneled and sworn on November 1, 1965, to try the issues, and on November 2, 1965, a motion of the State to nolle prosse was sustained over the objections of petitioner. The March 19, 1964, indictment did not allege intent to permanently deprive the owner of the use or benefit of the property,[2] and the State's motion for a mistrial and to nolle prosse was grounded on the assertion that this indictment did not allege an offense and was therefore void. Petitioner's motion to dismiss the second indictment and for discharge was denied. His trial proceeded and resulted in the conviction assailed in the District Court habeas corpus proceeding on the basis of double jeopardy.[3]

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1. Knowingly obtaining unauthorized control over stolen property, etc. as defined by Ill. Rev. Stat. 1963, ch. 38, §16.1(d).

2. Intent to so deprive the owner of the property is an essential element of the statutory offense sought to be charged, and its omission invalidated the indictment. *People* v. *Edge*, 406 Ill. 490, 493, 94 N.E. 2d 359; *People* v. *Harris*, 394 Ill. 325, 68 N.E. 2d 728.

3. Petitioner's conviction was earlier affirmed on appeal which rejected his claim of double jeopardy. *People* v. *Sommerville*, 88 Ill. App. 2d 212, leave-to-appeal denied 37 Ill. 2d 627, cert. den. 393 U.S. 823.

At the outset we recognize that petitioner's claim of double jeopardy is to be tested by the application of federal standards. *Benton* v. *Maryland*, 395 U.S. 784; *Ashe* v. *Swenson*, ...U.S..... (No. 57, October Term, 1969, April 6, 1970); *Walter* v. *Florida*, ...U.S..... (No. 24, October Term, 1969, April 6, 1970).[4]

Petitioner emphasizes that he did not attack the validity of the earlier March 19, 1964, indictment nor consent to its dismissal but, on the contrary, objected to the prosecutor's motion for a mistrial and to nolle prosse. He contends that he thus avoided any bar to his subsequent assertion of double jeopardy which might be based on any doctrine of consent, waiver or estoppel. And, petitioner argues that *Downum* v. *United States*, 372 U.S. 734, stands for the proposition that once the jury had been selected and sworn to try him on the March 19, 1964, indictment jeopardy attached so as to bar the prosecution under the subsequent indictment, and that *United States* v. *Ball*, 163 U.S. 662, compels the conclusion that this is so notwithstanding the invalidity of the earlier indictment.

In *Downum*, on the morning the case was called for trial both sides announced ready. A jury was selected, sworn, and instructed to return at 2 p.m. When it returned, the prosecution asked that the jury be discharged because its key witness on two counts of the indictment was not present—a fact discovered by the prosecutor only dur-

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4. The State does not question the retroactivity of *Benton* as applied to the circumstances of the instant case. This appears to be in accord with *Ashe*, *supra*, at ....., n. 1, although the scope of *Benton's* retroactivity has not been resolved. See *Waller*, *supra*, at ....., n. 2.

ing the noon recess. The witness had not been served with a summons, and no other arrangements had been made to assure his presence. The jury was discharged. In sustaining the claim of double jeopardy as to a retrial commenced two days later, the Supreme Court, while recognizing the valuable right of the defendant to proceed to trial before the jury he has participated in selecting, cautioned that at times this "valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him may be subordinated to the public interest—when there is an imperious necessity to do so." In this connection reference was made to *Keerl* v. *Montana*, 213 U.S. 135 (a "hung jury"); *Wade* v. *Hunter*, 336 U.S. 684 (tactical problems confronting an army in the field justifying withdrawal of a court-martial proceeding and commencement of another one on a later date); and *Simmons* v. *United States*, 142 U.S. 148 (likely existence of juror bias). Thus *Downum* explicitly teaches that it does not establish as absolute right in a defendant to have his trial completed by the jury selected and sworn for that purpose which in all circumstances bars discharge of that jury without his consent and a subsequent trial for the same offense.

In *United States* v. *Ball*, 163 U.S. 662, Ball was indicted, together with two other men, for the murder of one William T. Box. He was acquitted and his codefendants were convicted. They appealed and won a reversal on the ground that the indictment erroneously failed to aver the time or place of Box's death. All three defendants were retried and this time Ball was convicted. The Supreme Court sustained his double jeopardy claim, notwithstanding the invalidity of the original indictment on which he was acquitted. The precise holding as to Ball is succinctly stated (163 U.S. 662, 671) as follows:

"As to the defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution. However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense."

The "acquittal" appears to have been the operative factor dictating the result in *Ball*, not the mere circumstance that a jury had been impaneled and sworn. This is further evidenced by the observation made in *Ball* (p. 669) that:

"After the full consideration which the importance of the question demands . . . and the question being now for the first time presented to this court, we are unable to resist the conclusion that a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing."

And, it was the "acquittal" which was relied upon in *Benton* v. *Maryland*, 395 U.S. 784, in support of the holding that *Benton* was "totally indistinguishable" from *Ball*. In reference to *Ball* it is said (395 U.S. 784, 797), "[t]he Court refused to allow the Government to allege its own error to deprive the defendant [Ball] of the benefit of an acquittal by a jury", after which the Court went on to say:

"This case is totally indistinguishable. Petitioner was acquitted of larceny. He has, under *Green*, [*Green* v. *United States*, 355 U.S. 184] a valid double jeopardy plea which he cannot be forced to waive. Yet, Maryland wants the earlier acquittal set aside, over peti-

tioner's objections, because of a defect in the indictment. This it cannot do. Petitioner's larceny conviction cannot stand."

We perceive no proper basis for isolating the impanelling and swearing of the jury as constituting the conceptual charisma which at that point, and not withstanding invalidity of the indictment, always serves to establish that jeopardy which, absent the defendant's consent, bars a subsequent trial for the same offense. We believe our conclusion in this respect is reinforced by the admonition in *United States* v. *Tateo*, 377 U.S. 463, 466, that:

> "While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle [that part of the holding in *United States* v. *Ball*, 163 U.S. 662, which permitted retrial of the two defendants who had obtained reversal of their convictions because of invalidity of the indictment] are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the social interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest. The underlying purpose of permitting retrial is as much furthered by application of the rule to this case as it has been in cases previously decided."

In the instant appeal petitioner's conviction, unlike Ball's, did not follow a previous acquittal of the same offense, and we are of the opinion that the rationale of the pertinent and governing decisions do not warrant a conclusion that the mere impanelling and swearing of the jury under the invalid indictment precluded discharge of that jury except under a bar of double jeopardy which put him irrevocably beyond the reach of further prosecution for the offense under a valid indictment.

The judgment order of the District Court dismissing the petitioner's habeas corpus action is affirmed.

Affirmed.

MAJOR, *Senior Circuit Judge*, dissenting. In my judgment, the decision in *Downum* v. *United States*, 372 U.S. 734, that jeopardy attached at the time the jury was impaneled under facts as similar to those in the instant case as two peas in the same pod, is controlling. Both cases were dismissed on motion of the Government because of its own fault. In Downum, it was the failure of the Government to procure the attendance of a material witness; in the instant case, it was an allegedly defective indictment for which it was responsible.

The quotation from Downum in the majority opinion is not complete. In that case the court further stated (page 736):

> "Harrassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches. *Gori* v. *United States, supra*, 369. But those extreme cases do not mark the limits of the guarantee. The discretion to discharge the jury before it has reached a verdict is to be exercised 'only in very extraordinary and strik-

ing circumstances,' to use the words of Mr. Justice Story in *United States* v. *Coolidge*, 25 Fed. Cas. 622, 623. For the prohibition of the Double Jeopardy Clause is 'not against being twice punished, but against being twice put in jeopardy.' *United States* v. *Ball*, 163 U.S. 662, 669."

The proclamation in Downum cannot be swept aside because the court recognized and referred to some cases where defendant's right to have his trial completed was subordinated to the public interest—when there is "an imperious necessity to do so" or in "very extraordinary and striking circumstances." These so-called exceptions were of no avail to the Government in Downum, nor are they in the instant case.

The decision in Downum as to when jeopardy attaches, given the facts of that case, has never been overruled or criticized by any court of which I am aware. In fact, it has often been recognized as the prevailing rule.

There are, of course, cases where the courts have refused to apply the rule of Downum, because of different factual situations. Usually such cases distinguish Downum on the basis that a judgment of conviction was vacated, reversed on appeal or the indictment dismissed on motion of the defendant. Even these cases, however, recognize the vitality of Downum where the dismissal is made on motion by the Government. Typical of such cases is *United States* v. *Tateo*, 377 U.S. 463, where a judgment of conviction was set aside as a result of a collateral attack by the defendant. The court held that defendant could not rely on double jeopardy, and in doing so stated (page 467):

"*Downum* v. *United States*, 327 U.S. 734, is in no way inconsistent with permitting a retrial here. There the Court held that when a jury is discharged because the prosecution is not ready to go forward with its case,

the accused may not then be tried before another jury."

A case much in point which vividly illustrates the distinction between cases where a dismissal is procured on motion of the Government and those where it is procured on motion of the defendant is the recent decision of this court in *United States* v. *Franke*, 409 F. 2d 958, where we denied defendant's plea of double jeopardy on the ground that the case relied upon as constituting jeopardy was dismissed on defendant's motion. In doing so we recognized Downum but distinguished it on the facts. We reasoned (page 959):

> "We think that since the original indictment was dismissed *on defendant's motion* the denial of the double jeopardy motion was proper. See *United States* v. *Ewell*, 383 U.S. 116, 124-125, 86 S. Ct. 773, 15 L. Ed. 2d 627 (1966), where defendant's convictions were set aside on their own motion and the Double Jeopardy Clause was found not to bar retrial for the same offense. See also *United States* v. *Tateo*, 377 U.S. 463, 84 S. Ct. 1587, 12 L. Ed. 2d 448 (1964), where the Court held the Double Jeopardy Clause not violated by retrial of the same alleged crimes after Tateo's conviction on a plea of guilty had been set aside *on his motion*. It is enough for us to say that here defendant's motions caused dismissal of the indictment — even though the order of dismissal came after the selection of jury — and retrial under corrected indictment is not precluded by the Double Jeopardy Clause. If, after convictions are overturned at instance of defendants, retrials are not barred by the Double Jeopardy Clause, *a fortiori*, defendant's trial under the corrected indictment here is not barred." (Italics supplied.)

As to Downum we stated (page 959):

> "In Downum the jury was discharged because the prosecution was not ready to proceed. Pleas of former

jeopardy were denied and the Supreme Court reversed. The Supreme Court in Tateo said that Downum was not inconsistent with the Tateo rule. 377 U.S. at 467, 84 S. Ct. 1587. Since we follow Tateo it follows that our decision is not inconsistent with Downum. *Ipso facto* our decision here is not inconsistent with *Cornero* v. *United States*, 48 F. 2d 69, 74 A.L.R. (9th Cir. 1931), a case involving facts similar to Downum, and which was approved in *Downum*, 372 U.S. at 737, 83 S. Ct. 1033."

The Supreme Court in Downum quoted from Cornero (page 737):

> "'The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy. There is no difference in principle between a discovery by the district attorney immediately after the jury was impaneled that his evidence was insufficient and a discovery after he had called some or all of his witnesses.'"

Ball v. *United States*, 163 U.S. 662, is wholly irrelevant to the issue as to whether jeopardy attached at the time the jury was impaneled as no such issue was before the court. The sole pertinency of Ball to the situation before us is that it completely refutes the State's argument that the defendant was not in jeopardy because the indictment, allegedly defective, stated no offense and a judgment entered thereon would have been void. In Ball, the court held (page 670):

> "But, although the indictment was fatally defective, yet, if the court had jurisdiction of the case and of the party, its judgment is not void, but only voidable by writ of error, and until so avoided cannot be collaterally impeached." (Quoted with approval in *Benton* v. *Maryland*, 395 U.S. 784, 797.)

In the instant matter the court had jurisdiction of the case and the parties, and a judgment rendered after trial would have been voidable, not void.

The majority opinion places much stress on Ball, supposedly for the purpose of showing that jeopardy did not attach when the jury was impaneled. In my view, for reasons previously stated, such reasoning is not sound. If it has any merit, it is strange that the Supreme Court when it decided Downum April 22, 1963, and determined that jeopardy attached when the jury was impaneled, was unaware of its previous decision in Ball.

In my view, the decision in Downum requires a reversal of the order appealed from.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

ORDER OF AFFIRMANCE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Thursday, May 14, 1970

Before

Hon. J. Earl Major, Senior Circuit Judge

Hon. Latham Castle, Senior Circuit Judge

Hon. Thomas E. Fairchild, Circuit Judge

No. 17817 UNITED STATES OF AMERICA, ex rel., DONALD SOMMERVILLE, *Petitioner-Appellant,* vs. STATE OF ILLINOIS, *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment order of the said District Court dismissing the petitioner's habeas corpus action be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

ORDER DENYING REHEARING
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Wednesday, August 19, 1970

Before

Hon. Latham Castle, Sr. Circuit Judge

Hon. J. Earl Major, Sr. Circuit Judge

Hon. Thomas E. Fairchild, Circuit Judge

UNITED STATES OF AMERICA, ex rel., DONALD SOMMERVILLE, *Petitioner-Appellant*, vs. No. 17817 STATE OF ILLINOIS, *Respondent-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

On consideration of the petition of petitioner-appellant, United States of America, ex rel Donald Sommerville, for a rehearing by the Court *en banc* in the above entitled appeal, and, no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing,

IT IS ORDERED that the petition of the petitioner-appellant for a rehearing in the above entitled appeal be, and the same is hereby denied.

ORDER OF SUPREME COURT REVERSING AND REMANDING

SUPREME COURT OF THE UNITED STATES

No. 976, October Term, 1970

DONALD SOMMERVILLE, Petitioner

v.

ILLINOIS

On Petition for writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

The petition for a writ of certiorari is granted, the judgment is vacated, and the case is remanded to the United States Court of Appeals for the Seventh Circuit for reconsideration in light of *United States* v. *Jorn*, 401 U.S.——, decided January 25, 1971; and *Downum* v. *United States*, 372 U.S. (1963). Mr. Justice Douglas is of the opinion that the petition should be granted and the judgment of the United States Court of Appeals for the Seventh Circuit reversed. *United States* v. *Jorn*, 401 U.S.——, decided January 25, 1971.

April 5, 1971
OPINION OF THE COURT OF APPEALS—
JULY 20, 1971
SEPTEMBER TERM, 1970, APRIL SESSION, 1971

No. 17817
UNITED STATES OF AMERICA, ex rel. DONALD SOMERVILLE,
Petitioner-Appellant,
v.
STATE OF ILLINOIS,
Respondent-Appellee.

On Remand from the Supreme Court of the United States.

July 20, 1971

Before MAJOR and CASTLE, *Senior Circuit Judges,* and FAIRCHILD, *Circuit Judge.*

MAJOR, *Senior Circuit Judge.* This case had its genesis by way of a petition for habeas corpus filed in the district court by Donald Somerville, which asserted that he was being held in custody unlawfully pursuant to a sentence imposed in a trial which subjected him to double jeopardy, in violation of the Fifth Amendment. It was alleged that Somerville had been placed in jeopardy by reason of a previous state court charge which was dismissed on motion of the government, after a jury had been impaneled and sworn to try the case. The district court dismissed the petition for failure to state a claim upon which relief could be granted. From such dismissal Somerville appealed to this court.

The principal issue involved the interpretation and effect to be given *Downum* v. *United States,* 372 U.S. 734. This court, with one judge dissenting, in an opinion rendered May 14, 1970, held that *Downum* was not applicable and

affirmed the district court's order of dismissal. *U.S. ex rel. Somerville* v. *State of Illinois*, 429 F. 2d 1335.

On January 25, 1971, the Supreme Court decided *United States* v. *Jorn*, 400 U.S. 470. On Somerville's petition for writ of certiorari, that court on April 5, 1971 entered an order which in material part provided:

> "The petition for a writ of certiorari is granted, the judgment is vacated, and the case is remanded to the United States Court of Appeals for the Seventh Circuit for reconsideration in light of *United States* v. *Jorn*, 400 U.S. 470, decided January 25, 1971; and *Downum* v. *United States*, 372 U.S. 734 (1963)."

After receipt of the mandate, we requested counsel for the respective parties to submit briefs in support of their contentions relative to *Downum* and *Jorn*. This has been done, and this court, with one judge dissenting, now holds that those decisions require that the order of the district court be reversed and Somerville discharged.

We think it not necessary to reiterate the factual situation or the reasoning employed in our previous majority and dissenting opinions. One factor, however, which appears to have been strongly relied upon by the majority is that Somerville was not in jeopardy because he was not tried and acquitted. *United States* v. *Ball*, 163 U.S. 662, and *Benton* v. *Maryland*, 395 U.S. 784, are cited in support of this reasoning. The fact that jeopardy attached in those cases at the time the defendants were tried and acquitted furnishes no support for the premise that jeopardy in the instant case did not attach at the time the jury was impaneled and sworn to try the case. Any doubt on this score has been removed by the Supreme Court.

In *Green* v. *United States*, 355 U.S. 184, 188, the court stated:

"Moreover, it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again."

In *Jorn*, the court recognised this principle (page 480):

"Thus the conclusion that 'jeopardy attaches' when the trial commences expresses a judgment that the constitutional policies underpinning the Fifth Amendment's guarantee are implicated at that point in the proceedings."

We doubt the necessity, much less the pertinency, of attempting to discuss *Jorn* in detail. Generally, the cases dealing with double jeopardy fall into two categories, (1) where a mistrial is declared without any affirmative action on the part of the defendant, or (2) where a mistrial is declared on defendant's motion or a conviction reversed on his appeal. *Downum*, *Jorn* and the instant case fall squarely in the first category. In *Downum*, it was the failure of the government to secure the attendance of a material witness; in the instant case, it was an allegedly defective indictment for which the government was responsible, and in *Jorn*, it was the trial judge who aborted the proceeding, without defendant's consent. In *Jorn*, the court (page 474) stated:

"The issue is whether appellee had been 'put in jeopardy' by virtue of the impaneling of the jury in the first proceeding before the declaration of mistrial."

After citing and discussing numerous cases where the plea of double jeopardy had been denied, all on facts we think quite dissimilar to those here, the court stated (page 484):

"For the crucial difference between reprosecution after appeal by the defendant and reprosecution after a *sua sponte* judicial mistrial declaration is that in the first situation the defendant has not been deprived of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal. *On the other hand, where the judge, acting without the defendant's consent, aborts the proceeding, the defendant has been deprived of his 'valued right to have his trial completed by a particular tribunal.'* See *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949)." (Italics supplied.)

The Supreme Court in *Jorn* apparently recognized the validity of *Downum*. It stated (page 486):

"The trial judge must recognize that lack of preparedness by the Government to continue the trial directly implicates policies underpinning both the double jeopardy provision and the speedy trial guarantee. Cf. *Downum* v. *United States*, 372 U.S. 734 (1963)."

Mr. Chief Justice Burger in a concurring opinion made the pertinent statement (page 488):

"If the accused had brought about the erroneous mistrial ruling we would have a different case, but this record shows nothing to take appellee's claims outside the classic mold of being twice placed in jeopardy for the same offense."

That statement would have been as appropriate to the facts in *Downum* as it is to those of the instant case.

The State of Illinois in its brief, supposedly written as an aid to our interpretation of *Jorn*, contends that Illinois, not federal, law is controlling on the issue as to when jeopardy attaches. We see no purpose in pursuing this line of reasoning. Under the mandate of the Supreme Court the case has been remanded for reconsideration in

the light of *Jorn* and *Downum*, and not Illinois law. In our previous opinion we held that Somerville's claim of double jeopardy must be tested by the application of federal standards (page 1336). Moreover, the issue has been settled adversely to the State by *United States* v. *Ball*, 163 U.S. 662, and *Benton* v. *Maryland*, 395 U.S. 784.

We hold that in the light of *Downum* and *Jorn*, the petition for habeas corpus should have been allowed and Somerville discharged. The order appealed from is reversed and the cause remanded for that purpose.

CASTLE, *Senior Circuit Judge*, dissents for the reasons set forth in *United States of America ex rel. Donald Somerville* v. *State of Illinois*, 429 F. 2d 1335.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

ORDER OF REVERSAL
UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

JULY 20, 1971

Before

Hon. Earl Major, Senior Circuit Judge
Hon. Latham Castle, Senior Circuit Judge
Hon. Thomas E. Fairchild, Circuit Judge

UNITED STATES OF AMERICA, ex rel. DONALD SOMERVILLE, *Petitioner-Appellant,* vs. No. 17817 STATE OF ILLINOIS, *Respondent-Appellee.*	On Remand from the Supreme Court of the United States.

There has been filed in the office of the Clerk of this Court a certified copy of the judgment of the Supreme Court of the United States, as follows:

"ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals in this cause be, and the same is hereby, vacated with costs; and that this cause be, and the same is hereby, remanded to the United States Court of Appeals for the Seventh Circuit for reconsideration in light of United States v. Jorn, 401 U.S. 470, and Downum v. United States, 372 U.S. 734 (1963).

It is further ordered that the said petitioner, Donald Somerville, recover from the State of Illinois One

Hundred Dollars ($100) for his costs herein expended."

Pursuant to the order of this Court supplementary briefs were filed by counsel for the parties. On consideration whereof,

IT IS ORDERED AND ADJUDGED by this Court that the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, in this cause appealed from be, and the same is hereby reversed with costs, and that this cause be, and the same is hereby remanded to the said District Court with directions to grant the petition for habeas corpus and to order the discharge of petitioner-appellant Donald Somerville.

ORDER DENYING REHEARING
UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
Friday, September 3, 1971.

Before

Hon. Latham Castle, Senior Circuit Judge
Hon. J. Earl Major, Senior Circuit Judge
Hon. Thomas E. Fairchild, Circuit Judge

UNITED STATES OF AMERICA, ex rel. DONALD SOMERVILLE,
Petitioner-Appellant,
vs.
No. 17817
STATE OF ILLINOIS,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

On consideration of the petition for rehearing and suggestion that it be heard en banc filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and a majority of the members of the panel having voted to deny a re-hearing,

IT IS ORDERED that the petition for a rehearing in the above entitled cause be and the same is hereby denied.

ORDER GRANTING CERTIORARI
SUPREME COURT OF THE UNITED STATES

No. 71-692

ILLINOIS, Petitioner,

v.

DONALD SOMERVILLE

On petition for writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

The petition for a writ of certiorari is granted.

March 20, 1972

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E. ROBERT SEAVER, CLE...

IN THE

...reme Court of the United States

No. 71- 71-692

...PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

...TED STATES ex rel. DONALD SOMERVILLE,

Respondent.

...PETITION FOR WRIT OF CERTIORARI TO ...E UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM J. SCOTT,
Attorney General,
State of Illinois,

JOEL M. FLAUM,
First Assistant Attorney General,

JAMES B. ZAGEL,
E. JAMES GILDEA,
Assistant Attorneys General,
Criminal Justice Division,
188 West Randolph Street, Suite 2200,
Chicago, Illinois 60601.

Attorneys for Petitioner.

Printed by Authority of the State of Illinois — 365

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Authorities Cited

IN THE

Supreme Court of the United States

No. 71-

THE PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

UNITED STATES ex rel. DONALD SOMERVILLE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner The People of the State of Illinois, respondent-Appellee in the Court below, prays that a writ of *certiorari* issue to review the judgment entered by the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals, Seventh Circuit, is reported at —— F. 2d ——, (7th Cir. 1971) (No. 17817), and is attached hereto as Appeendix A.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit, were entered on July 20, 1971, with one judge dissenting. The State's petition for rehearing by the court *en banc* was denied on September 3, 1971.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether a mistrial which is declared after selection of a jury and before the taking of any evidence, based on an indictment which is insufficient to charge an offense under state law, and which thus deprives the court of the power to exercise jurisdiction over the controversy, thereby constitutes a bar to any retrial on the basis of the double jeopardy provision of the Fifth Amendment as made applicable to State prosecutions by the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

Fourteenth Amendment to the Constitution of the United States:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

The petitioner, Donald Somerville, and one Marjorie Kullerstand were indicted in March 1964. The indictment charged that they committed the offense of theft on March 24, 1963, "in that they knowingly obtained unauthorized control over stolen property, to wit: thirteen hundred dollars in United States Currency, the property of Zayre of Bridgeview, Inc., a corporation, knowing the same to have been stolen by another in violation of Chapter 38, Section 16-1(d) of the Illinois Revised Statutes of 1963."

On November 2, 1965, a jury was selected and sworn and without further action the cause was continued to the following day. Before any evidence was taken and before opening statements were delivered by counsel, the prosecutor moved the court to withdraw a juror and declare a mistrial, stating as his reason therefore that the indictment was void in that it failed to aver the necessary intent. Defense counsel replied to the motion: "Your honor, both defendants object to this at this time." The court allowed the prosecution's motion, withdrew a juror and declared a mistrial.

The next day a new indictment was returned. The petitioner then filed a motion to dismiss the indictment pursuant to the Illinois statute prohibiting prosecutions when there has been a former prosecution for the same offense. The motion was denied. A jury was selected and sworn and a verdict of guilty was returned. The petitioner was sentenced to the Illinois State Penitentiary for a period of from two to ten years.

REASONS FOR GRANTING THE WRIT

This case was decided by the United States Court of Appeals for the Seventh Circuit after it was remanded by this Court for reconsideration in light of *United States* v. *Jorn*, 400 U.S. 470, and *Downum* v. *United States*, 372 U.S. 734 (1963). Earlier, the court of appeals had affirmed a district court ruling dismissing a petition for a writ of habeas corpus. In that instance the court was divided two to one. After the case was remanded by this Court, one judge reversed his position, and, consequently, the court of appeals has now decided to reverse the district court with one judge dissenting.

In reversing itself, the court failed to apply the test prescribed by this Court in *United States* v. *Jorn*, 400 U.S. at 481; it did not determine whether there was a "manifest necessity" for declaring a mistrial for the preservation of the objectives of "public justice." Rather, the court, contrary to *Jorn*, ruled against the State because, in its opinion, the prosecution was "responsible" for "an allegedly defective indictment" which led the trial court to declare a mistrial (A. 11). The court of appeals did not consider the question of whether there were valid reasons for not going forward with the trial at the time that the mistrial was declared. It was of the mistaken opinion that it could not consider problems of state judicial procedure in deciding whether or not there was justification for aborting the trial. It thought immaterial our contention that the trial court, when it declared a mistrial, was following the dictates of constitutionally valid state law in that it was without judicial authority to act in the cause except to declare its own incapacity. The court of appeals refused to consider that argument on the basis that federal, and not state, law

was controlling.* While correctly recognizing the rule, the court erred in the manner in which it applied it in this case. As a result, the court has created needless conflict between the right of a state to limit the exercise of judicial power by its courts and the obligation of all courts, federal and state, to uphold the constitutionally declared right of a person not to be twice placed in jeopardy.

The court of appeals, while refusing to even consider the circumstance of existing state criminal procedures, has placed the viability of those procedures in question by its decision. Illinois is one of those states where an indictment by a grand jury is required by state constitution. In interpreting that provision of our constitution, the Illinois Supreme Court has held that a state court has no authority to act in a felony criminal case where there is not a sufficient indictment (which is substantively unalterable by anyone but the grand jury). Any act by a

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*In doing so the court cited United States v. Ball, 163 U.S. 662, and Benton v. Maryland, 395 U.S. 784 (A. 13). However, Justice Castle, in writing for the court in its earlier opinion, pointed out the distinction: "The 'acquittal' appears to have been the operative factor dictating the result in Ball, not the mere circumstance that a jury had been impaneled and sworn;" and, ". . . it was the 'acquittal' which was relied upon in Benton v. Maryland . . ." United States ex rel. Sommerville v. Illinois, 429 F. 2d 1335, 1337 (7th Cir. 1970).

The state's position here is not that the court's lack of jurisdiction meant that the defendant was not in jeopardy, but that the court's lack of jurisdiction created a "manifest necessity" to call a halt to the proceedings. Neither Ball nor Benton involved the issue of "manifest necessity."

court in a criminal case of felony magnitude absent a valid indictment is extrajudicial. This state has developed a substantial body of law consistently holding that a defendant never loses the right to challenge the authority of a court to act in a given case no matter when he raises the issue. A defendant cannot be foreclosed from avoiding a judgment of conviction entered by a court which was not properly empowered to act.*

As a result of this aspect of Illinois law, the trial court in this case, once it became aware of the insufficiency of the indictment, as a matter of Illinois law was required to declare a mistrial. That decision was preordained, and it was not within the discretion of the court to refuse to recognize that it had no authority to preside over the case. In a matter of state concern, a state court cannot proceed where it is not authorized to do so. The trial court had to declare a mistrial even were it to mean that the defendant could not thereafter be prosecuted. The failure to adhere to the jurisdictional requirement of a valid indictment because of the specter of a subsequent double jeopardy defense would in itself have been a denial of the Equal Protection Clause of the Fourteenth Amendment.

The court of appeals overlooked the fact that otherwise appropriate state criminal procedures are not ren-

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*People v. Edge, 406 Ill. 490, 493, 94 N.E. 2d 359, 361 (1950); People v. Harris, 394 Ill. 325, 68 N.E. 2d 728, 729-30 (1946); People v. Fore, 384 Ill. 455, 51 N.E. 2d 548 (1943). See also, People v. Sommerville, 88 Ill. App. 2d 212, 232 N.E. 2d 155 (1967), leave to appeal denied, 37 Ill. 2d 627 (1968), cert. denied, 393 U.S. 823; People v. Greene, 92 Ill. App. 2d 201, 235 N.E. 2d 195 (1968); People v. Billingsley, 67 Ill. App. 2d 292, 213 N.E. 2d 765 (1966).

dered invalid simply because they have an incidental impact on the resolution of federally declared rights. Transfixed by a desire to uphold the defendant's Fifth Amendment right, the court of appeals foreswore any need to balance that consideration against Illinois' interest in the administration of its jurisprudence. The court of appeal's decision makes meaningless that portion of the rule announced in *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824) and reasserted in *Jorn*, 400 U.S. at 481, which requires that the trial court consider the public's interests as well as the defendant's in exercising its discretion as whether or not to declare a mistrial. As a result of the decision, an important element of Illinois jurisprudence has been undermined if not obliterated.

CONCLUSION

For the reasons stated herein, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General,
State of Illinois.

JOEL M. FLAUM,
First Assistant Attorney General.

JAMES B. ZAGEL,

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Attorneys for Petitioner.

APPENDIX A

SEPTEMBER TERM, 1970, APRIL SESSION, 1971

No. 17817

UNITED STATES OF AMERICA ex rel. DONALD SOMERVILLE,

Petitioner-Appellant,

v.

STATE OF ILLINOIS,

Respondent-Appellee.

On Remand from the Supreme Court of the United States.

JULY 20, 1971

Before MAJOR and CASTLE, *Senior Circuit Judges*, and FAIRCHILD, *Circuit Judge*.

MAJOR, *Senior Circuit Judge*. This case had it genesis by way of a petition for habeas corpus filed in the district court by Donald Somerville, which asserted that he was being held in custody unlawfully pursuant to a sentence imposed in a trial which subjected him to double jeopardy, in violation of the Fifth Amendment. It was alleged that Somerville had been placed in jeopardy by reason of a previous state court charge which was dismissed on motion of the government ,after a jury had been impaneled and sworn to try the case. The district court dismissed the petition for failure to state a claim upon which relief could be granted. From such dismissal Somerville appealed to this court.

The principal issue involved the interpretation and effect to be given *Downum* v. *United States*, 372 U.S.

734. This court, with one judge dissenting, in an opinion rendered May 14, 1970, held that *Downum* was not applicable and affirmed the district court's order of dismissal. *U.S. ex rel. Somerville* v. *State of Illinois*, 429 F. 2d 1335.

On January 25, 1971, the Supreme Court decided *United States* v. *Jorn*, 400 U.S. 470. On Somerville's petition for writ of certiorari, that court on April 5, 1971 entered an order which in material part provided:

> "The petition for a writ of certiorari is granted, the judgment is vacated, and the case is remanded to the United States Court of Appeals for the Seventh Circuit for reconsideration in light of *United States* v. *Jorn*, 400 U.S. 470, decided January 25, 1971; and *Downum* v. *United States*, 372 U.S. 734 (1963)."

After receipt of the mandate, we requested counsel for the respective parties to submit briefs in support of their contentions relative to *Downum* and *Jorn*. This has been done, and this court, with one judge dissenting, now holds that those decisions require that the order of the district court be reversed and Somerville discharged.

We think it not necessary to reiterate the factual situation or the reasoning employed in our previous majority and dissenting opinions. One factor, however, which appears to have been strongly relied upon by the majority is that Somerville was not in jeopardy because he was not tried and acquitted. *United States* v. *Ball*, 163 U.S. 662, and *Benton* v. *Maryland*, 395 U.S. 784, are cited in support of this reasoning. The fact that jeopardy attached in those cases at the time the defendants were tried and acquitted furnishes no support for the premise that jeopardy in the instant case did not attach at the time the jury was impaneled and sworn to try the case.

Any doubt on this score has been removed by the Supreme Court.

In *Green* v. *United States*, 355 U.S. 184, 188, the court stated:

> "Moreover, it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again."

In *Jorn*, the court recognized this principle (page 480):

> "Thus the conclusion that 'jeopardy attaches' when the trial commences expresses a judgment that the constitutional policies underpinning the Fifth Amendment's guarantee are implicated at that point in the proceedings."

We doubt the necessity, much less the pertinency, of attempting to discuss *Jorn* in detail. Generally, the cases dealing with double jeopardy fall into two categories, (1) where a mistrial is declared without any affirmative action on the part of the defendant, or (2) where a mistrial is declared on defendant's motion or a conviction reversed on his appeal. *Downum*, *Jorn* and the instant case fall squarely in the first category. In *Downum*, it was the failure of the government to secure the attendance of a material witness; in the instant case, it was an allegedly defective indictment for which the government was responsible, and in *Jorn*, it was the trial judge who aborted the proceeding, without defendant's consent. In *Jorn*, the court (page 474) stated:

> "The issue is whether appellee had been 'put in jeopardy' by virtue of the impaneling of the jury in

the first proceeding before the declaration of mistrial."

After citing and discussing numerous cases where the plea of double jeopardy had been denied, all on facts we think quite dissimilar to those here, the court stated (page 484):

> "For the crucial difference between reprosecution after appeal by the defendant and reprosecution after a *sua sponte* judicial mistrial declaration is that in the first situation the defendant has not been deprived of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal. *On the other hand, where the judge, acting without the defendant's consent, aborts the proceeding, the defendant has been deprived of his 'valued right to have his trial completed by a particular tribunal.'* See *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949)." (Italics supplied.)

The Supreme Court in *Jorn* apparently recognized the validity of *Downum*. It stated (page 486):

> "The trial judge must recognize that lack of preparedness by the Government to continue the trial directly implicates policies underpinning both the double jeopardy provision and the speedy trial guarantee. Cf. *Downum* v. *United States*, 372 U.S. 734 (1963)."

Mr. Chief Justice Burger in a concurring opinion made the pertinent statement (page 488):

> "If the accused had brought about the erroneous mistrial ruling we would have a different case, but this record shows nothing to take appellee's claims outside the classic mold of being twice placed in jeopardy for the same offense."

That statement would have been as appropriate to the facts in *Downum* as it is to those of the instant case.

The State of Illinois in its brief, supposedly written as an aid to our interpretation of *Jorn*, contends that Illinois, not federal, law is controlling on the issue as to when jeopardy attaches. We see no purpose in pursuing this line of reasoning. Under the mandate of the Supreme Court the case has been remanded for reconsideration in the light of *Jorn* and *Downum*, and not Illinois law. In our previous opinion we held that Somerville's claim of double jeopardy must be tested by the application of federal standards (page 1336). Moreover, the issue has been settled adversely to the State by *United States* v. *Ball*, 163 U.S. 662, and *Benton* v. *Maryland*, 395 U.S. 784.

We hold that in the light of *Downum* and *Jorn*, the petition for habeas corpus should have been allowed and Somerville discharged. The order appealed from is reversed and the cause remanded for that purpose.

CASTLE, *Senior Circuit Judge*, dissents for the reasons set forth in *United States of America ex rel. Donald Somerville* v. *State of Illinois*, 429 F. 2d 1335.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

Friday, September 3, 1971.

Before

Hon. LATHAM CASTLE, Senior Circuit Judge
Hon. J. EARL MAJOR, Senior Circuit Judge
Hon. THOMAS E. FAIRCHILD, Circuit Judge

UNITED STATES OF AMERICA, ex rel. DONALD SOMERVILLE,
Petitioner-Appellant,
vs.
No. 17817
STATE OF ILLINOIS,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

On consideration of the petition for rehearing and suggestion that it be heard en banc filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and a majority of the members of the panel having voted to deny a re-hearing,

IT IS ORDERED that the petition for a rehearing in the above entitled cause be and the same is hereby denied.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-692

THE PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

UNITED STATES ex rel. DONALD SOMERVILLE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Respondent's statement of reasons for granting the writ suggests the Seventh Circuit Court of Appeals ignored the mandate of this Court remanding this case for further consideration in light of *United States* v. *Jorn*, 400 U.S. 470 (1970) and *Downum* v. *United States*, 372 U.S. 734 (1963). More specifically, respondent contends that the lower court ignored the mandate of *Jorn* in failing to apply the prescribed test of whether there was a "mani-

fest necessity" for declaring a mistrial and argues that the lower court rested its ruling solely upon the fact that the prosecution was responsible for the defective indictment (Respondent's petition, p. 4).

This contention of petitioner ignores the fact that this case was remanded for consideration in light of *both Jorn* and *Downum*, and that, as recognized by Judge Major in his previous dissenting opinion, the facts of this case are as similar to those in *Downum* ". . . as two peas in the same pod." *United States ex rel. Somerville* v. *State of Illinois*, 429 F.2d 1335, 1338 (7th Cir. 1970). Although petitioner seeks merely to rely upon *Jorn* and to ignore the equally significant decision of this Court in *Downum*, a reading of both cases, separately or together, compels the conclusion that this case falls outside the ". . . number of limited situations in which retrial is permissible" as defined by this Court in applying the *Perez* doctrine of "manifest necessity." (*Note, Double Jeopardy—Declaration of Mistrial Without Consent of Defendant*, 32 La. L. Rev. 147, 148) Petitioner's argument merely begs the question of whether there was a "manifest necessity" by asserting in conclusory fashion that a manifest necessity for declaration of a mistrial existed. An analysis of the facts of *Jorn*, *Downum* and the instant case compels the opposite conclusion.

1. Rather than supporting the contention of petitioner that the decision of the lower court represents a misapplication of *Jorn*, the facts of the instant case compare most favorably to those of *Jorn*, where the mistrial did not result from any neglect or action by the government and where, as here, there was a lack of consent by the defendant to the mistrial. In *Jorn*, the government urged on brief presumably in an effort to distinguish *Jorn* from *Downum*,

as follows: "In sum, the mistrial was not due to any lack of proper preparation by the prosecution." (Brief for the United States, p. 19) The facts here are directly contrary, for the mistrial in the instant case is and was attributable solely to the lack of proper preparation by the prosecution exhibited by the procuring of the defective indictment.

In addition, in *Jorn* the Court emphasized the lack of consent of defendant to a mistrial, strenuously opposed by defendant in the instant case.

One commentator has observed that in *Jorn* this Court announced "a . . . new policy involving greater scrutiny of a trial judge's declaration of mistrial without the consent of the defendant." (*Note, supra*, at 150) The effect of *Jorn* is thus ". . . to limit substantially the discretion a trial judge has to declare a mistrial without the consent of the defendant." (*Note, supra*, at 150)

Thus, in placing excessive reliance upon *Jorn* and in ignoring *Downum*, petitioner fails to recognize the factual distinction between *Jorn* and *Downum*, in each of which, however, this Court found the *lack* of any "manifest necessity" for declaration of a mistrial and found that a second trial violated petitioner's right not to be placed twice in jeopardy for the same offense and deprived him of his right to be tried by the jury already selected and sworn. In *Jorn* the mistrial resulted from the actions of the trial court alone. In *Downum* the mistrial resulted from and was caused by the actions of the prosecution. Accordingly, the extent that the lower court's decision was predicated upon the actions of the prosecution in procuring a defective indictment and proceeding to trial upon the same, the lower court, relying upon *Downum* and the cases cited therein, directly followed the order of the Court remanding this case for further consideration in light of *Jorn* and *Downum*.

Lending further support to the decision of the lower court, this Court in *Jorn* expressly recognized the ". . . lack of preparedness by the Government to continue the trial directly implicates policies underpinning both the double jeopardy provision and the speedy trial guarantee." (*United States* v. *Jorn*, 400 U.S. 470, 486) (citing *Downum*)

2. Contrary to the contention of petitioner that the "manifest necessity" doctrine was not considered by the lower court, the Court of Appeals did in fact recognize and apply the "manifest necessity" rule of *Jorn*, which is cited and quoted from throughout the opinion, but concluded (correctly, we urge) that no "manifest necessity" exists for declaration of a mistrial where the mistrial is caused by the return of a defective indictment by the prosecution and where defendant does not consent to a mistrial. Recognizing the importance of the lack of any action by defendant in causing the mistrial in *Jorn*, Chief Justice Burger observed, in words most applicable here, that this case fits the "classic mold of being twice placed in jeopardy for the same offense." *Jorn* v. *United States*, 400 U.S. at 488 (concurring opinion). This observation of the Chief Justice was quoted by the lower court. (447 F.2d at 735)

Respondent seems to ignore the fact that the "manifest necessity" doctrine was not created by this Court in *Jorn*, but rather has always been the touchstone for determining whether declaration of a mistrial followed by retrial for the same offense places a defendant twice in jeopardy. From *United States* v. *Perez*, 22 U.S. 9 (Wheat.) 579 (1824) through *United States* v. *Ball*, 163 U.S. 662 (1896), *Wade* v. *Hunter*, 336 U.S. 684 (1949), *Green* v. *United States*, 355 U.S. 184, *Gori* v. *United States*, 367 U.S. 364 (1961), *Downum* v. *United States*, 372 U.S. 734 (1969),

and finally *Jorn*, that Court has always adhered to the "manifest necessity" test.

In citing and relying upon many of these cases and particularly the leading case of *Downum* v. *United States*, the lower court squarely faced the issue and decided that where the prosecution procures a defective indictment and proceeds to trial thereon, there exists no "manifest necessity" for declaration of a mistrial. Accordingly, petitioner cannot urge that the lower court failed to consider and apply the "manifest necessity" test for declaration of a mistrial.

3. Petitioner further contends that the writ should be granted because the lower court refused to consider ". . . the circumstance of existing state criminal procedures," namely that in certain States, including Illinois, a State Court has no authority to act upon a defective indictment. This contention ignores the fact that following this Court's decision in *Benton* v. *Maryland*, 395 U.S. 784 (1970), the question of whether a defendant has been twice placed in jeopardy is a matter to be determined by *federal law* and under federal law a defective indictment renders a conviction not void but merely *voidable*, as recognized in *United States* v. *Ball*, 163 U.S. 662, 669-70 (1896). Directing itself to this issue, the lower court plainly rejected petitioner's contention that respondent's claim of double jeopardy must be tested by Illinois law and held that the issue of whether a defendant is placed in jeopardy by a defective indictment ". . . has been settled adversely to the State by United States v. Ball, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300, and Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed. 707." (447 F.2d 733, 735).

Petitioner's contention that the judgment of the lower court is erroneous because existing State procedures

rendered the trial court powerless to try respondent and required a mistrial under Illinois law (Petition, p. 6) simply begs the essential issue—namely, whether under *federal law* there was a "manifest necessity" for declaration of a mistrial, for, it must not be forgotten, if the trial court was required to declare a mistrial, the trial court was placed in such a position by the actions of the prosecution, not the defendant, and therefore under *Downum* there was no "manifest necessity" to declare a mistrial, notwithstanding any requirement of State law.

4. Finally, in urging that the trial court ". . . had no authority to preside over the case" (Petition, p. 6) petitioner's approach is somewhat quixotic and ignores the practical aspects of the administration of criminal justice with a view toward fairness to defendants as well as to the public. Following the argument of petitioner to its logical conclusion—namely, that the trial court was powerless to act and thus the proceedings were a "nullity"—it would appear that numerous persons have served and are serving a sentence which is a "nullity," a position which is clearly untenable. As observed by this Court in *Ball*, "Many hundreds, perhaps, are now in the state prison on erroneous indictments, who, however, have been fairly tried on the merits." (*United States* v. *Ball*, 163 U.S. 662, 668). These proceedings are perhaps a "nullity" to all concerned except the prisoner whose incarceration is a very real fact indeed. To adopt the position urged by petitioner would exacerbate such a Kafkaesque situation in which persons placed on trial on defective indictments could be retired, perhaps *ad infinitum*, without even knowing whether their trial or sentence was a "nullity" and was to be repeated at some future time.

CONCLUSION

For the reasons urged herein, respondent respectfully prays that the writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit be denied.

Respectfully submitted,

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February 1972

FILE COPY

MAY 25 1972

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-692

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

DONALD SOMERVILLE,

Respondent.

(On Writ Of Certiorari To The Court Of Appeals For The Seventh Circuit)

BRIEF FOR PETITIONER

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Printed by Authority of the State of Illinois

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IN THE

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OCTOBER TERM, 1971

No. 71-692

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

DONALD SOMERVILLE,

Respondent.

(On Writ Of Certiorari To The Court Of Appeals For The Seventh Circuit)

BRIEF FOR PETITIONER

OPINIONS BELOW

The petitioner advanced his claim of double jeopardy in a direct appeal to the Appellate Court, First District, of the State of Illinois. The opinion is reported at 88 Ill. App. 2d 212 and 232 N.E. 2d 115 (1967). He then filed a petition to the Supreme Court of Illinois for a review of the appellate court decision, and that petition was denied. The denial of the petition for leave to appeal is reported at 37 Ill. 2d 627 (1967).

The opinion of the district court dismissing the petition for a writ of habeas corpus was not reported and is contained in the Appendix at 13.

The first opinion of the Court of Appeals for the Seventh Circuit affirming the district court is reported at 429 F. 2d 1335 (1970), and is contained in the Appendix at 18.

The second opinion of the Court of Appeals for the Seventh Circuit, the review of which is the subject of the writ of *certiorari*, is reported at 447 F. 2d 733 (1971), and is contained in the Appendix at 32.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit were entered on July 20, 1971, with one judge dissenting. App. at 32. The State of Illinois' petition for a rehearing by the court *en banc* was denied September 3, 1971. App. at 39.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a mistrial, which is declared after selection of a jury and before the taking of any evidence because the indictment is insufficient to charge an offense under state law, constitutes a bar to any retrial on the basis of the double jeopardy provision of the Fifth Amendment as made applicable to state prosecutions by the Fourteenth Amendment in a case where the void indictment deprives the state court of any power to exercise jurisdiction over the controversy.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States:

> " . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

Fourteenth Amendment to the Constitution of the United States:

> " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

Donald Somerville filed a petition for a writ of habeas corpus in the District Court for the Northern District of Illinois alleging as his sole grounds for relief that he had been twice placed in jeopardy contrary to the Fifth and Fourteenth Amendments of the Federal Constitution. App. 7-8. His petition alleged that he had once been placed on trial and a jury had been sworn whereafter the state prosecutor stated that the indictment was insufficient and asked the court to dismiss the jury, which it did. Thereafter a new indictment was returned, and he pleaded the bar of former jeopardy, which was overruled. He was tried, convicted and sentenced to the state penitentiary.

The State of Illinois, which was named as respondent, filed an answer to a rule to show cause entered by the district court and alleged that the petitioner was incarcerated pursuant to a judgment of conviction upon a verdict of guilty returned by a jury upon a trial for the offense of theft. The answer alleged that upon the first

trial, after the jury had been sworn, but before any evidence had been taken, the jury was discharged on motion of the prosecution over the token objection of the defendant because the indictment failed to allege criminal intent and therefore was void. The State's answer stated that a new and correct indictment was returned by the grand jury then sitting and that the petitioner was tried thereon and convicted. App. 12-13.

Both sides filed briefs in support of their positions, and there being no issue of fact, the court ruled on the pleadings and dismissed the petition on the basis that it was insufficient to support a claim for relief. The petitioner appealed to the Court of Appeals for the Seventh Circuit, and that court affirmed the order of dismissal with one judge dissenting. App. 18. The petitioner then filed a petition for a writ of *certiorari* to this Court. The petition was granted and the Court, without hearing argument, reversed and remanded with instructions to reconsider in light of *Downum* v. *United States* and *United States* v. *Jorn*. App. 31.

On remand the court of appeals requested additional briefs addressed solely to the application of *United States* v. *Jorn* to this case. The court of appeals then reversed the order of dismissal with one judge dissenting. Thereafter the State of Illinois filed a petition for a writ of *certiorari*, which this Court granted on March 20, 1972.

SUMMARY OF ARGUMENT

This Court has adhered to the "manifest necessity" doctrine in resolving the issue of double jeopardy when a former prosecution has been dismissed without the con-

sent of the defendant. Although a defendant in such a case loses the benefit of a particular jury, the loss is only speculative and he never loses the opportunity of selecting a fair and impartial jury to try his case. The right to a particular jury, standing alone, should not override the competing interest that society has in having the issue of the defendant's guilt decided on the merits.

The double jeopardy proscription is intended to foreclose government harassment and oppression against the accused. Erroneous indictments do not provide a convenient source for abuse of the prosecutor's powers: jurisdictional defects are objectively determinable, and the prosecution, at the time the indictment is drafted, is as likely to be injured by a void charge as is the defendant and, therefore, has every incentive to see that it is correctly framed. In contrast, the prosecution's inability to proceed with its evidence, as in *Downum* v. *United States*, is not judicially determinable. In *Downum* there was no "manifest necessity" to dismiss the case because other alternatives were available for alleviating the problem that arose. Further, the prosecution in *Downum* assumed the risk of being unable to prove its case when it proceeded to trial and in so doing abused its power of prosecution in assuming that it could avoid the consequences of an adverse verdict by obtaining a dismissal. None of these factors were present in this case.

Considering the number of possibilities for error that exist in the course of a criminal case, the Court should not formulate a rule of double jeopardy based solely on the source of error giving rise to the need for dismissing the proceedings unless it first determines that it is necessary to do so in order to effectuate the policies underlying the rule; nor should trial judges be encouraged to refrain

from discharging a jury when fatal error has occurred in order to avoid immunising the defendant from further prosecution. Unless the government has abused its power of prosecution, a trial judge should be allowed to discharge a jury whenever irreversible error has occurred without foreclosing further proceedings.

The order discharging the jury in this case was not an abuse of discretion because the court could not legally proceed with the trial. This was a state prosecution, and Illinois requires that felony prosecutions be initiated by grand jury indictment except when knowingly and intelligently waived by the defendant. An indictment which is insufficient to charge a crime does not entitle the court to try an accused. If the indictment cannot be amended, the court cannot continue, and is obliged to terminate the proceedings.

Traditionally, the rule against double jeopardy has excepted from its application former prosecutions which were terminated because of jurisdictional defects. While the prosecution cannot avoid an acquittal by subsequently questioning the jurisdiction of the court in a case where a defect was not known and the proceedings were not illegal, if a defect does become known to the parties and the court before a verdict is rendered, any proceedings thereafter would become illegal. The court below has departed from the traditional rule because of an erroneous conception of this Court's decisions.

For these reasons the opinion below should be reversed.

ARGUMENT

I.

A JURISDICTIONALLY DEFECTIVE INDICTMENT WHICH NECESSITATES THE DECLARATION OF A MISTRIAL SHOULD NOT BAR REPROSECUTION.

United States v. *Jorn*, 400 U.S. 470, 485-86 (1971), speaks about the "need to hold litigants on both sides to standards of responsible professional conduct in the clash of an adversary criminal process," thereby seemingly bringing into issue either side's responsibility for bringing about a mistrial. However, the Court also disavowed the creation of any "rules based on the source of the particular problem giving rise to a question of whether a mistrial should or should not be declared. . . ." *Id.* at 486. The point was considered insofar as it might affect a trial judge's discretion in declaring a mistrial rather than a criterion for determining whether there might be a reprosecution; the abuse of discretion rule was still the test for making that determination. Thus where either side engages in conduct which taints the proceedings, it might become necessary to declare a mistrial in order to prevent a miscarriage of justice.[1] Errors are not unexpected in the course of a criminal prosecution: statements are made which are improper,[2] sometimes by the

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1. Of course deliberate misconduct designed to avoid an acquittal might well bar reprosecution. United States v. Jorn, 400 U.S. at 486 n.12; United States v. Tateo, 377 U.S. 463, 468 n.3 (1964).

2. Himmelfarb v. United States, 175 F. 2d 924 (9th Cir. 1949) *cert. den.*, 338 U.S. 860.

trial judge;[3] defects occur in procedural matters affecting arraignment,[4] or in the rendition of the verdict,[5] or examination of witnesses[6] or, as here, in the drafting of the indictment.[7] The fact that so many cases are reversed for new trials is evidence of the number of possibilities for error that exist. Reprosecutions are not precluded simply because the error was occasioned by the prosecution or the court since that would be an unnecessarily high price to exact from society to safeguard the interest of the defendant.[8]

It has been noted, however, that a mistrial deprives the defendant of the opportunity of having his case considered by the jury of his selection, whereas when there is a reversal the defendant has not lost that opportunity.[9] This

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3. United States v. Giles, 19 F. Supp. 1099 (D.C. Okla. 1937); People v. Thomas, 15 Ill. 2d 344, 346-50; 155 N.E. 2d 16 (1958) *cert. den.*, 359 U.S. 1005.

4. Lovato v. New Mexico, 242 U.S. 199, 202 (1916).

5. Houp v. Nebraska, 427 F. 2d 254 (8th Cir. 1970); Crawford v. United States, 285 F. 2d 661 (D.C. Cir. 1960).

6. *Of.* Gori v. United States, 367 U.S. 364 (1961).

7. Haugen v. United States, 153 F. 2d 850 (9th Cir. 1946); Wolkoff v. United States, 84 F. 2d 17 (6th Cir. 1936); Simpson v. United States, 229 F. 940 (9th Cir. 1916), *cert. den.*, 241 U.S. 668.

8. "The determination to allow reprosecution in these circumstances reflects the judgment that the defendant's double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decision making resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error." United States v. Jorn, 400 U.S. at 484.

9. United States v. Jorn, 400 U.S. at 484.

distinction does not give sufficient consideration to the fact that reversal is premised on a finding that error occurred during the trial that was prejudicial and therefore might very well have lost the jury for the defendant. If so, the opportunity of going to the jury was worthless, and the distinction is insubstantial.[10] Furthermore, this presupposes that rather than just being entitled to a fair and impartial jury, a defendant deserves a jury of particular composition. While a defendant has a right to participate in the jury selection process, his degree of participation may vary widely depending on how much leeway the court allows the parties during *voir dire* of the jury. The Constitution tolerates such discretion in the trial judge because its primary concern is not with a particular composition but with the opportunities for selecting a fair and impartial jury. The privilege of selecting one particular jury should not loom so large as to override society's interest in having the case determined on the merits. It should be borne in mind that the loss of a particular jury, while perhaps not inconsiderable, does not foreclose the defendant from the opportunity of receiving a fair trial by another selected jury. The value to the defendant of a particular jury is not capable of objective determination, whereas the effect of the bar of double jeopardy is reckonable and final.

While it might be argued that if the government is responsible for a defective indictment it should bear the

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10. *Cf.* United States v. Tateo, 377 U.S. 463, 466-67 (1964). "If the operative double jeopardy policy is to prevent the prosecution from depriving the accused of trial by the first jury impaneled, prosecution conduct leading to a reversible conviction is as offensive as that leading to a mistrial." Note, 77 Harv. L. Rev. 1272, 1280 (1964).

loss of further prosecution, such a penalty should not be imposed in the absence of a need to do so in order to effectuate the policies underlying the rule against double jeopardy. That policy which comes to mind is that which concerns governmental harassment or oppression; but defective indictments present little opportunity for that. There is every incentive for correctly framing an indictment since the prosecution stands to suffer as much as the defendant as a result of a void charge. Any tactical advantages derivable from a defective indictment are not perceptible at the time an indictment is drafted. Since a jurisdictionally defective indictment is readily subject to objective determination, the prosecutor cannot avail himself of a non-defective indictment as a pretext for gaining a mistrial when he encounters adversity during the presentation of his case.[11] On the other hand, jurisdictionally defective indictments which cannot be amended by the prosecution may provide a source for "abuse by the defendant of society's unwillingness to unnecessarily subject him to repeated prosecutions" by immunizing him from a sustainable conviction and inviting him to withhold objection until after an adverse judgment. *Cf. United States* v. *Tateo*, 377 U.S. 463, 468 and 468 n. 4 (1964).[12]

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11. *But see* Duncan v. Tennessee, —— U.S. ——, 92 S. Ct. 785, 787, (Brennan, Douglas and Marshall, J.J. dissenting). (2/23/72).

12. In 1964 there were 3,846 separate indictments involving 5,034 defendants returned by Cook County, Illinois grand juries. Chicago Crime Commission, A Report On Chicago Crime For 1964, at 7 and 8. With this number of indictments it is not unexpected that errors in draftsmanship will occur; the report shows that 2 indictments were dismissed on motions to quash. *Id.* at 9.

In contrast to the instant case, *Downum* v. *United States*, 372 U.S. 735 (1963), must be recognized as one having different dimensions because of the prosecution's inability to sustain its burden of proof upon the trial of the merits. In the words adopted by the Court: "The situation presented [was] simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict." 372 U.S. at 737. It is shortsighted to conclude that the holding rested simply on the basis that the prosecution created the predicament which occasioned the mistrial. *Jorn* rejected this as a criterion for deciding issues of double jeopardy. 400 U.S. at 485 and 486. Other factors more pertinent were involved. They reached the policy considerations underlying the rule itself, namely, "that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *United States* v. *Jorn*, 400 U.S. at 479. *See also Green* v. *United States*, 355 U.S. 184, 187-88 (1958).

After Downum had been placed on trial, the prosecution asserted that an essential witness was unavailable and that therefore it could not muster sufficient evidence with which to convict. It sought to put the case over to a more opportune time when it could garner sufficient evidence. As matters stood when the prosecution asked for the mistrial, the defendant, had the case proceeded to verdict, would assumedly have gained an acquittal. The fact that the prosecutor was remiss in failing to safeguard against this development is coincidental; the critical fact

was that the government could not convict the defendant with the evidence it had, and the defendant could not rightfully be deprived of the expectancy of an acquittal. Even if the prosecution had been blameless, as for example, if instead of being unavailable the witness had suddenly and unexpectedly become recalcitrant and refused to testify or testified falsely in favor of the defendant, that probably would not have justified the prosecution in asking for a mistrial for the purpose of seeking additional evidence with which to secure a conviction.[13] And not to be overlooked is the potential for abuse that this kind of mistrial presents since the necessity for the dismissal is not susceptible to judicial determination, but, rather, depends on the appraisal of the prosecutor: "If the prosecutor disliked the jury, or some of them, or hoped to find the defendant less prepared at a future day, or wished unnecessarily to harass him, he might at any time, attain his end, if, by solely alleging want of proof after a jury was sworn, he could get rid of them." *People* v. *Barret*, 2 Caines (N.Y.) 304, 308 (1805).

There are other factors which distinguish *Downum*, notably with regard to the "manifest necessity" doctrine. In *Downum* the government expressed its inability to proceed because of the absence of a witness named Rutledge. However, as the Court noted in its opinion, the indictment, as it concerned Downum, comprised six counts, only two of which involved Rutledge. Thus the case could have proceeded to trial on the remaining four counts. 372 U. S. at 737. Downum's counsel moved the court to dis-

13. Dortch v. United States, 203 F. 2d 709 (6th Cir. 1953), is a case that suggests otherwise, however, the rationale of the opinion is that a *nolle prosequi* is not tantamount to acquittal and, therefore, does not bar re-prosecution.

miss the Rutledge counts and to proceed on the others; however, the government objected and the court overruled Downum's motion. Justice Clark noted in his dissenting opinion that conviction on the remaining four counts would have been sufficient to support the maximum sentence. *Id.* at 743. In terms of the "manifest necessity" criteria, the interests of public justice would not have been frustrated had the case proceeded without Rutledge. In addition to that, the prosecutor assigned to the case knew beforehand that Rutledge had not been subpoenaed and that his whereabouts were unknown. In short, he proceeded to trial with full knowledge of the attendant risk, which was in itself an abuse of the prosecutor's authority. Furthermore, the trial judge failed to employ the available alternative of granting a short continuance to secure the attendance of Rutledge. The fact that he was available two days later demonstrates the unnecessity for discharging the jury under those circumstances.

In the instant case, the trial proceeded no further than the selection of the jury. The occasion for the mistrial is "plain and obvious": the court lacked jurisdiction; it could not try the issues without violating a valid State constitutional provision.[14] Thus the proceedings had to be terminated. In terms of the underlying policy considerations, there is less cause to find a breach under the circumstances of this case than there is in the case of a mistrial caused by a hung jury. In the latter case the evidence has been heard, the prosecution has learned the

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14. *Cf.* Smith v. United States, 360 U.S. 1, 10 (1959); *Ex Parte* Bain, 121 U.S. 1, 13 (1887); Albricht v. United States, 273 U.S. 1, 8 (1926); United States v. Beard, 414 F. 2d 1014 (3rd Cir. 1966); Martiney v. United States, 216 F. 2d 760 (10th Cir. 1954), *cert. den.*, 348 U.S. 953 (1955).

defendant's case and has tested the strength of its own case. All things being equal, the prosecution is in a better position to secure a conviction upon a retrial. Secondly, the defendant has suffered the disquietude of an entire trial, and the anxiety of awaiting the verdict and the frustration of not receiving it. The personal hardships for the defendant are all the greater. Thirdly, considering that the *onus probandi* is upon the prosecution and not the defendant, technically speaking, it is chargeable with the failure to sustain its burden of proof in a single trial. Fourthly, that the jury could not agree, manifesting as it does one or more of the juror's doubts, is some evidence of the defendant's innocence. *Cf. Brock v. North Carolina*, 344 U.S. 424, 442 (Douglas, J., dissenting) (1953). It may even occur that only one of the jurors believes that the defendant is guilty. Or it may be that the prosecution failed in some respect in the presentation of its evidence, the correction of which on retrial will naturally enhance its ability to secure a conviction.[15] Still, this Court as repeatedly held that a mistrial because of a hung jury does not bar reprosecution.[16]

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15. In one case it was reported that an indictment as drafted, while apparently sufficient for jurisdictional purposes, nevertheless may have been so confusing to the jury as to contribute to or perhaps even cause their inability to agree. Newsweek, April 17, 1972, at 33. If this were the case there is no distinction between the effect produced by the indictment in that case and the instant one.

16. United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824); Logan v. United States, 144 U.S. 263 (1892); Dreyer v. Illinois, 187 U.S. 71 (1902); Keerl v. Montana, 213 U.S. 135 (1909).

A rule which automatically excludes as a basis for declaring a mistrial without barring reprosecution any event attributable to the prosecution is both unnecessary in principle and inexpedient in practice. The principal basis for the rule of double jeopardy is to foreclose abuse of prosecutorial discretion[17] and not to provide an escape hatch for the defendant. Where the event precipitating a mistrial is calculated to abort a trial in progress, the underlying policy is implicated and the rule should be applied. This would include the prosecution's declination to proceed with its evidence without sufficient reason. On the oter hand, events which do not conflict with the policy considerations underlying the rule should not, in the absence of some compelling reason, foreclose a trial on the merits. A rule which limits reprosecutions to mistrials caused by a "breakdown in judicial machinery" requires that a trial continue to its probably reversible conclusion whenever some other impediment occurs. This will necessitate a retrial whenever the case results in a conviction.

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17. Sigler, Double Jeopardy, 157-87 (1969). As to this point and its application here, reference should be made to Gori v. United States, 367 U.S. 364, and United States v. Jorn, 400 U.S. 470. In Gori, the trial judge declared a mistrial when he anticipated misconduct by the prosecutor. Concededly the judge was premature and erred in acting so quickly in declaring a mistrial; yet his error in aborting the trial did not operate as a bar to reprosecution. In Jorn, the trial judge also declared a mistrial prematurely; however, in that instance he abused his discretion and, therefore, reprosecution was barred. There is no rationale for different standards with respect to the conduct of the prosecutor since the effect on the defendant in either case will be the same.

"More satisfactory than the limitation of manifest necessity to 'breakdown[s] in judicial machinery' may be an interpretation couched in terms of whether a verdict sustainable on appeal could not have been obtained had the trial judge not terminated the proceeding when he did. If the answer is yes, reprosecution ought to be barred unless the accused himself solicited a mistrial. If the answer is no, reprosecution ought to be permitted unless the prosecution intentionally precipitated a mistrial. Since a mistrial for prosecutor misconduct not so designed would bar reprosecution only if the trial judge erred in concluding that a sustainable verdict was no longer possible, he has every incentive to terminate the proceeding when it has become incurably tainted."[18]

"[A] criminal trial is, even in the best of circumstances, a complicated affair to manage." *United States* v. *Jorn*, 400 U. S. at 479. It requires the coordination of a great many people to prepare a case for trial. Not all of them are trained lawyers. Even the most ministerial functions may, however, affect the end result. When there are so many things to be accounted for, some will necessarily require more attention than others, as for example the assembling and interviewing witnesses, marking and identifying physical evidence, scheduling trial dates, answering pretrial motions, legal research, supervising followup investigation, *etc.* Complexity in turn creates more occasions for mistakes. The Court should not fashion a rule that cannot tolerate a retrial solely because the responsibility for a mistrial is chargeable to the prosecution if there is no basis for concluding that there was a misuse of the prosecutor's powers.

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18. 77 Harv. L. Rev. at 1281.

II.

UNDER THE DOCTRINE OF "MANIFEST NECESSITY" THERE IS NO ABUSE OF DISCRETION WHEN A COURT DISCHARGES A JURY BECAUSE OF A JURISDICTIONAL DEFECT IN THE PROCEEDINGS.

Precedent does not oppose retrial after dismissal of a previous prosecution before verdict because of a defective indictment (*infra* at 24). Admittedly there has been a tendency to avoid immutable and narrow rules when dealing with double jeopardy issues arising in that class of cases where "the initial proceedings are aborted prior to verdict without the defendant's consent." *United States* v. *Jorn*, 400 U.S. 470, 480. Instead, this Court has adopted the policy that trial judges may "discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." 400 U.S. at 481.[19] This policy invites latitudinal application. Attempts to elicit more explicit statements from the Court have for the most part been rejected. *E.g.*, *Wade* v. *Hunter*, 336 U.S. 684, 691 (1949); *United States* v. *Jorn*, 400 U.S. at 480. However, in *Jorn* the Court did focus attention on the adjunctive precept that trial judges are required to exercise "sound discretion" in deciding whether there exists a manifest necessity for declaring a mistrial. The issue surfaced in that case after the trial judge abruptly declared a mistrial for the ostensible purpose of protecting the Fifth Amendment rights of prosecution witnesses even after being told by

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19. *See* Annotation, 6 L. Ed. 2d at 1510.

both the witnesses and the prosecutor that sufficient safeguards had been provided. In addition to the lack of necessity for the declaration of the mistrial, the precipitateness thereof precluded any alternative measures such as a short continuance to allow the witnesses to confer with counsel. The Court found that it was an abuse of discretion to declare a mistrial under these circumstances.

Judged by that case, there was no abuse of discretion here. The indictment failed to allege intent, an element of the offense which the statute proscribed[20] and which

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20. Ill. Rev. Stat. 1963, Ch. 38, § 16-1(d)(1):

"16-1. § 16-1. Theft.) A person commits theft when he knowingly:

(a) Obtains or exerts unauthorized control over property of the owner; or

(b) Obtains by deception control over property of the owner; or

(c) Obtains by threat control over property of the owner; or

(d) Obtains control over stolen property knowing the property to have been stolen by another or under such circumstances as would reasonably induce him to believe that the property was stolen, and

(1) *Intends to deprive the owner permanently of the use or benefit of the property; or*

(2) Knowingly uses, conceals or abandons the property in such manner as to deprive the owner permanently of such use or benefit; or

(3) Uses, conceals, or abandons the property knowing such use, concealment or abandonment will deprive the owner permanently of such use or benefit."

was necessary to convict the defendant.[21] Where intent is an element of the offense it must be alleged and proved.[22] Failure to allege a necessary element of intent amounts to a failure to allege a crime.[23] At the time, Illinois by constitution provided that "[n]o person shall be held to answer for a criminal offense unless on indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment other than the penitentiary, in cases of impeachment, and in cases arising in the army and navy, or in the militia, when in actual service in time of war or public danger . . . ."[24] In construing this provision the Supreme Court of Illinois has held that an indictment is a jurisdictional requirement for a criminal prosecution in this State: *People* v. *Edge*, 406 Ill. 490, 493, 94 N.E. 2d 359, 361 (1950); *People* v. *Harris*, 394 Ill. 325, 68 N.E. 2d 728, 729-30 (1946); *People* v. *Fore*, 384 Ill. 455, 51 N.E. 2d 548 (1943). Intermediate courts have adhered to the rule: *People* v. *Greene*, 92 Ill. App. 2d 201, 235 N.E. 2d 295 (1968); *People* v. *Somerville*, 88 Ill. App. 2d 212, 232 N.E. 2d 115 (1967), *leave to appeal denied*, 37 Ill. 2d 627 (1968), *cert. den.*, 393 U.S. 823;

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21. People v. Matthews, 122 Ill. App. 2d 264, 258 N.E. 2d 378, 382 (1970); People v. Hayn, 116 Ill. App. 2d 241, 245, 253 N.E. 2d 575 (1969); People v. Somerville, 88 Ill. App. 2d 212, 232 N.E. 2d 115 (1967), *leave to appeal denied*, 37 Ill. 2d 627 (1968), *cert. den.*, 393 U.S. 823 (1968).

22. People v. Edge, 406 Ill. 490, 493, 94 N.E. 2d 359 (1950); People v. Harris, 394 Ill. 325, 68 N.E. 2d 728 (1946); *See* 16 A.L.R. 3d 1093.

23. *See* 17 A.L.R. 3d 1181, 1217-22.

24. Constitution of Illinois 1870, Art. II, § 8. The Illinois Constitution was amended in 1970, but this provision has been retained in Article I, § 7.

People v. *Billingsley*, 67 Ill. App. 2d 292, 213 N. E. 2d 765 (1966). Further, it is required that the indictment be sufficient to charge the commission of an offense. *People ex rel. Ledford* v. *Brantley*, 46 Ill. 2d 419, 422, 263 N. E. 2d 27 (1970). Viewed in the context of applicable Illinois law, the judge could not have proceeded with the trial.[25] Whatever the circumstances with regard to the State's right to reprosecute, when the trial judge was called upon to decide the question of his own judicial authority to try the case, he had no choice but to declare his want of jurisdiction and to terminate the proceedings. Even if the judge had believed that the State could not reprosecute if he terminated the case under these circumstances, that fact would not have changed anything insofar as his obligation to declare his lack of jurisdiction. The jurisdictional requirement was not suspended by reason of any unwanted consequence; the court's duty remained unaffected.[26]

Aside from the judicial impropriety of proceeding to trial in the face of the fatal infirmity, the practical consideration that no conviction obtained could have withstood subsequent attack meant that the case would have had to be retried if the defendant had been convicted. In effect, then, the defendant was no longer in jeopardy—if he ever was—since he was aware of the jurisdictional defect, and any judgment of conviction could not prevail against him. While a prosecutor cannot avoid a verdict

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25. *Cf.* 17 A.L.R. 3rd 1181, 1217.

26. "[W]hile the trial judge should not be free to terminate a proceeding for minor prosecution misconduct neither should he be deterred from terminating an irrevocably flawed proceeding out of fear of immunizing the accused from further prosecution." 77 Harv. L. Rev. at 1281.

of acquittal simply by raising a jurisdictional issue, where a jurisdictional defect is recognized before the proceedings have run their full course, the case cannot proceed to verdict without the taint of illegality. In the case of discovery of the defect after acquittal, the rendition of the verdict is not illegal since the error was not known at the time; furthermore, it cannot be said that the determination of the jury was influenced by the jurisdictional defect. In the case where the error is discovered before the verdict, the entire proceedings, including the rendition of the verdict, would become illegal once the case proceeded after the parties discovered that the court was without power in law to try the case.[27] No one could reasonably argue that a trial should proceed in that instance. "Concepts of impartial justice and scrupulous fairness to a defendant do not include an opportunity to speculate upon the chance of a favorable verdict when . . . a legal defect has substantially eliminated the chance of an unfavorable one." *People* v. *Thomas*, 15 Ill. 2d 344, 349-50; 155 N.E. 2d 16 (1958), *cert. den.*, 359 U.S. 1005. *Jorn* does not conflict with what the trial judge did in this case, hinging as it did on the abuse-of-discretion

27. It has been suggested that when confronted with error during the course of the trial, "rather than impose a mistrial and thereby immunize the defendant against further prosecution, the judge may prefer to let the trial run to its probably reversible conclusion." *Id.* at 1279. Under the circumstances of this case, even if the trial had continued and a conviction were obtained and later reversed for want of jurisdiction, there might still be merit to a plea of double jeopardy at any subsequent prosecution since the court would have acted illegally in proceeding to verdict in the first place.

principle, since here there was no discretion available to the judge.[28]

Also in contradistinction to the *Jorn* situation is the fact that alternatives were not available here for alleviating the problem. The indictment could not have been corrected. Some states have enacted statutes which permit the amendments of indictments.[29] The extent to which amendments are permitted vary among the several states depending upon their particular statutes. Illinois has an amendment statute;[30] however, it is limited to the cor-

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28. The American Law Institute Model Penal Code, Proposed Official Draft, Art. 1, Sec. 1.08(4)(b)(2), allows for reprosecution when a trial has been terminated because "[t]here is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law. . . ." The Commentary on Subsection (2) defines "legal necessity" for a mistrial as a "void indictment or information or some other serious procedural defect."

29. 17 A.L.R. 3d 1181, 1208 *et seq.*

30. Ill. Rev. Stat. 1963, ch. 38, § 111-5 provided:

"An indictment, information or complaint which charges the commission of an offense in accordance with Section 111-3 of this Code shall not be dismissed and may be amended on motion by the State's Attorney or defendant at any time because of formal defects, including:

(a) Any miswriting, misspelling or grammatical error;

(b) Any misjoinder of the parties defendant;

(c) Any misjoinder of the offense charged;

(d) The presence of any unnecessary allegation;

(e) The failure to negative any exception, any ex-

rection of formal defects. *People* v. *Petropoulos,* 59 Ill. App. 2d 298, 208 N.E. 2d 323, 336 and 336 n. 13, (1965) *aff'd.* 34 Ill. 2d 179, 214 N.E. 2d 765 (1966); *People* v. *Hall,* 55 Ill. App. 2d 255, 204 N.E. 2d 473, 474-75 (1964). The defect here was more than a formal one since the omitted portion comprised an essential element of the crime. In absence of an applicable amendment statute, no change could have been made in the indictment. *Patrick* v. *People,* 132 Ill. 529, 533; 24 N.E. 619 (1890).[31] Nor could the defect have been waived since it was jurisdictional. *People ex rel. Ledford* v. *Brantley,* 46 Ill. 2d at 422; *People* v. *Petropoulos,* 59 Ill. App. 2d 298; Ill. Rev. Stat. 1963, Ch. 38, Sec. 114-1 (b).[32]

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cuse or proviso contained in the statute defining the offense; or

(f) The use of alternative or disjunctive allegations as to the acts, means, intents or results charged."

31. *See* 17 A.L.R. 3d 1181, 1196-99, 1203-05.

32. *Id.* at 1199-1201, 1206. The Illinois Constitution contained a proviso that the indictment requirement could be dispensed with by enactment of the legislature. Pursuant thereto a statute (Ill. Rev. Stat. 1963, ch. 38, § 111-2) permitted waiver of indictment and prosecution by information. Waiver could not be presumed since the court by Supreme Court Rule must first admonish the defendant. Ill. Rev. Stat. 1963, Ch. 110, § 101.26.

I.I.I..

HISTORICALLY, THE RULE OF DOUBLE JEOPARDY HAS NOT BARRED REPROSECUTIONS IN THOSE CASES WHERE A FORMER PROSECUTION HAS BEEN DISMISSED FOR WANT OF JURISDICTION.

It has been the general rule that the bar of double jeopardy does not lie when a case is dismissed before verdict for want of jurisdiction.[33] Historically, this has been the case whether the want of jurisdiction was due to the court's inherent incompetency[34] or some defect in the criminal procedure by which the accused was prosecuted.[35] Typical of the reasons given is that stated by the Supreme Court of California in *People* v. *McNealy*, 17 Cal. 332 (1861):

> "It would be a contradiction in terms to say that a person was put in jeopardy by an indictment under which he could not be convicted, and it is obviously immaterial whether the inability to convict arises from a variance between the proof and the indictment, or from some defect in the indictment itself."

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33. Bartkus v. Illinois, 359 U.S. 121, 161 (1959) (Black, J., dissenting); Grafton v. United States, 206 U.S. 333, 345 (1907); United States v. Ball, 163 U.S. 662, 669 (1896); *Ex Parte* Lange, 85 U.S. (18 Wall.) 163, 174, (1873); United States v. Gibert, 25 Fed. Cas. 1287, 1295 (C.C.D. Mass. 1834); 1 Wharton, Criminal Law And Procedure 310 (Anderson Ed. 1957), Orfield, Double Jeopardy in Federal Criminal Cases, 3 Calif. West. L. Rev. 76, 83 (1967); Note, 77 Harv. L. Rev. 1272, 1281-82 (1964); Note, 24 Minn. L. Rev. 522, 526-27 (1940).

34. *Cf.* Diaz v. United States, 223 U.S. 442, (1912); *See* 4 A.L.R. 2d 874.

35. Simpson v. United States, 229 F. 940, 944 (9th Cir. 1916); 4 Blackstone, Commentaries *336.

The origin of the rule is buried in antiquity; however, for purposes of the present discussion, criticism surrounding the rule seems to have first arisen in *Vaux's Case*, 4 Co. 44a, 76 Eng. Rep. 992 (K.B. 1590). In that case, the defendant was discharged after being tried for murder when the jury returned a special verdict upon which a judgment was rendered in his favor. When he was indicted a second time for the same offense, Vaux pleaded the bar of *autrefois acquit*, and it was held that the plea was not good.

Vaux's Case provoked discussion as to whether the holding was correct in light of the bar of *autrefois acquit*, which has been subsumed in the concept of double jeopardy. In *Vaux* the special verdict recited that the deceased, Nicolas Ridley, was killed by taking poison and that Vaux (who was charged with persuading him to take it), was not present at the time. Upon the special verdict the trial court adjudged that Vaux was not guilty of murder. The Court of King's Bench, when it subsequently ruled on the issue of the plea of *autrefois acquit*, stated that Vaux could have been adjudged guilty as a principal even though he was not present when Ridley drank the poison. It held, however, that the first indictment was defective for failing to allege that Ridley received and drank the poison and that therefore Vaux had not been in jeopardy and could be retried.

The case has been criticized on the basis that Vaux had been adjudged not guilty even though the jury's verdict was special, and that the defendant's discharge was not attributable to the insufficiency of the indictment, even though Vaux had attacked the indictment as being insufficient. In explicating the decision, Lord Coke noted that the original judgment could have been given

for either lack of guilt or insufficiency of the indictment. 3 Inst. 214. Lord Hale, however, believed that the judgment was sustainable only on the basis of the verdict and therefore barred further prosecution, 2 Hale P. C. 394, 395: herein lies the basis of the criticism.

In *United States* v. *Ball*, 163 U.S. 662 (1896), the Court, after discussing the issue, rejected the idea that a defective indictment voids an acquittal on the merits. However, the original rule that a mistrial resulting from a jurisdictional defect does not bar reprosecution had not been rejected prior to the holding of the court of appeals below. The first opinion of the court of appeals distinguished this case from *Ball* and its progeny, *Benton* v. *Maryland*, 395 U.S. 784 (1969), on the basis that in the latter cases it was the *acquittal* which was relied upon by the Court in support of its holdings. App. at 22. In this regard it is indicative that the reasoning of the Court in *Ball* was taken from Justice Livingston's dissent in *People* v. *Barrett*, 1 Johns. (N.Y.) 66, 74 (1806). The Court made mention of the fact that Justice Livingston had distinguished those "cases in which upon the first trial there had been no general verdict of acquittal by the jury, but only a special verdict, upon which the court had discharged the defendant . . ." 163 U.S. at 667. In fact, Justice Livingston distinguished the *Barrett* case from *Vaux* on the basis that "[t]he jury had *not acquitted*, nor given *any opinion* on [Vaux's] guilt, but had referred the whole matter to the court." 1 Johns at *73. [emphasis in the original]. However, it was not simply an acquittal which influenced the Court in *Ball* but an acquittal on the merits. In the course of its reasoning the Court cited a Massachusetts' statute which provided in part:

> "If any person, who is indicted for an offense, shall on his trial be acquitted upon the ground of a variance between the indictment and the proof, or upon any exception to the form or to the substance of the indictment, he may be arraigned again on a new indictment, and may be tried and convicted for the same offense notwithstanding such former acquittal." 163 U.S. at 669.

The Court's holding in *Ball* was worded so as to limit its application to cases where there has been an acquittal on the merits:

> "[W]e are unable to resist the conclusion that a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing." *Id.* at 669.

Where there has not been an acquittal on the merits, it is not considered that the bar of double jeopardy precludes reprosecution when the case is dismissed because of a jurisdictional defect.[36] This is what the court of appeals originally decided. App. at 22. However, in the opinion below the court rejected this analysis—citing *Green* v. *United States*, 355 U.S. 184, 188 (1957) and *United States* v. *Jorn*, 400 U.S. 470 (1971)—upon the principle that jeopardy "attaches" and the issue is determined when the jury is sworn. App. at 33-34.[37]

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36. Simpson v. United States, 229 F. 940, 944 (9th Cir. 1916), *cert. den.*, 241 U.S. 668; Orfield, *supra*, note 33 at 81; 77 Harv. L. Rev. 1272, 1282.

37. The general rule is considered to be that which was stated in Hunter v. Wade, 169 F. 2d 973, 975 (10th Cir. 1948) *aff'd.*, 336 U.S. 684 (1949): "It is the general rule that an accused is in jeopardy within the meaning of the guaranty against double jeopardy contained in the

The concept of "attachment" has not proven satisfactory in resolving questions of former jeopardy.[38] In defining "attachment" just as in defining "jeopardy," abstract concepts do not always serve to effectuate the policies sought to be promoted by the rule prohibiting double jeopardy.[39] In this vein some commentators have found fault with the statement that a defendant has not been in "jeopardy" when he has been tried on a defective indictment.[40] But in spite of semantic objections, the fact remains that the origins of the plea of double jeopardy did not include the idea that it should bar reprosecution when a procedural defect prevents a judgment of conviction from being sustained. Thus, Blackstone qualifies the term in reference to such situations by saying that the "[defendant] has not been *in jeopardy* in the sense which entitles him to plead the former acquittal or conviction in bar of a subsequent indictment." 4 Blackstone Commen-

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Fifth Amendment to the Constitution of the United States when he is put on trial in a court of competent jurisdiction upon an indictment or information sufficient in form and substance to sustain a conviction and a jury has been empaneled and sworn; and where the case is tried to the court without the intervention of a jury, jeopardy attaches when the court begins the hearing of evidence."

38. *See, for example,* Himmelfarb v. United States, 175 F. 2d 924, 932 n.2 (9th Cir. 1949), *cert. den.*, 338 U.S. 860 (1949); Sigler, Double Jeopardy at 74 (1969); *Cf.* Stanford v. Robbins, 115 F. 2d 435, 438-39 (5th Cir. 1940), *cert. den.*, 312 U.S. 697.

39. *Cf.* United States v. Tateo, 377 U.S. 463, 466 (1964).

40. People v. Barrett, 1 Johns. (N.Y.) 66, 73 (1806).

taries *336.[41] Similarly, jurists have had to adapt the concepts of attachment and jeopardy to comport with the needs of particular factual situations. For example:

"[J]eopardy is not regarded as having come to an end in those cases where 'unforseeable circumstances . . . arise during [the first] trial making its completion impossible, such as the failure of a jury to agree on a verdict.' " *Green* v. *United States*, 355 U. S. 183, 188 (1957).

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"The double jeopardy provision of the Fifth Amendment, however, does not mean that everytime a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed." *Wade* v. *Hunter*, 336 U. S. 684, 688 (1949).

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"[T]he conclusion that 'jeopardy attaches' when the trial commences expresses a judgment that the constitutional policies underpinning the Fifth Amendment's guarantee are implicated at that point in the proceedings. The question remains, however, in what circumstances retrial is to be precluded when the initial proceedings are aborted prior to verdict without

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41. *Cf.* Regina v. Drury, 3 Car. & Kir. Rep. 193, 199 (1849): "The true meaning therefore of 'not having been in jeopardy' in this rule seems to be that, by reason of some defect in the record, either in the indictment, place of trial, process, or the like, the prisoners were not liable to suffer judgment for the offense charged in that proceeding, and so understood, it is true in the present case."

the defendant's consent." *United States* v. *Jorn*, 400 U. S. at 480 (1971).

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"In the *Ball* case, for example, the Court expressly rejected the view that the double jeopardy provision prevented a second trial when a conviction had been set aside. In so doing, it effectively formulated a concept of continuing jeopardy that has application where criminal proceedings against an accused have not run their full course." *Price* v. *Georgia*, 398 U. S. 323, 326 (1970).

It is just as wrong to resort dogmatically to the test of "attachment" to resolve a given case as it is to declare that because of a jurisdictional defect a defendant was not in "jeopardy." "Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result remain troubled by a classification where the lines of diversion are . . . wavering and blurred."[42]

The Court in *Ball*, rather than rejecting the traditional rule, voiced support for it when it said: "An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense." 163 U. S. at 669. It also said: "But although the indictment was fatally defective, yet, if the court had jurisdiction of the cause and of the party, its judgment is not void but only voidable by writ of error, and until so avoided cannot be collaterally impeached." *Id.* at 669 and 670. The

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42. Cardozo, *The Nature of the Judicial Process* at 44 (1921).

latter statement has been construed as indicating that all defective indictments are merely voidable and not void.[43] But this conclusion is not supported by *Ball* or any other decision of this Court. Reference to the first *Ball* case, where a murder indictment was held defective, *Ball* v. *United States*, 140 U.S. 118 (1891), discloses that the defect consisted of the omission of the date and place of the victim's death. The Court noted that the failure to allege the date of death was not fatal since the indictment was returned within a year and a day after the date of the assault, which was stated in the indictment. Therefore, the year-and-a-day rule necessary to support a charge of murder was satisfied. However, the Court held that the failure to state the place of death was fatal because a federal court, being one of limited jurisdiction, could not exercise judicial authority unless the offense was both begun and completed within one of the districts subject to the jurisdiction of the United States. *Id.* at 135 and 136; 18 Stat. 731.

What is important in terms of evaluating the subsequent *Ball* opinion, where the double jeopardy rule was expounded, is the statement in the earlier case that even though the failure to allege the place of death was fatal to the court's jurisdiction to try the offense of murder, the "[d]efendants were well charged with assault . . . ." *Id.* at 136. In the later case the Court said:

> "The former indictment set forth a charge of murder, although lacking the requisite fullness and precision. The verdict of the jury, after a trial upon the issue of guilty or not guilty, acquitted Millard F.

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43. United States *ex rel.* Somerville v. Illinois, 429 F. 2d 1335, (7th Cir. 1970) (Major, J., dissenting), App. at 28; Respondent's Brief In Opposition at 5.

> Ball of the whole charge, of murder, as well as of any less offense included therein. Revised Statutes, § 1035."[44] 163 U.S. at 670.

Since the greater offense necessarily included the lesser, of which Ball was found not guilty, he could not be convicted of murder. When viewed in light of these facts, *Ball* simply follows the traditional rule of *autrefois acquit*.

Benton v. *Maryland* postulates no broader rule on this point than *Ball*. In spit of the state's contention in *Benton* that the indictment was void and that therefore the defendant was not in "jeopardy," this Court noted that the "petitioner could quietly have served out his sentence under this 'void' indictment had he not appealed his burglary conviction." 395 U.S. at 796. Furthermore, Maryland has held that indictments defective for the reason involved in *Benton* are not void and do not deprive a court of jurisdiction. See, for example, *Smith* v. *State*, 240 Md. 464, 468-69, 214 A. 2d 563 (1965) and *Pratt* v. *Warden*, 8 Md. App. 274, 259 A. 2d 580, 583 (1969). Pertinent, perhaps, is the fact that the Maryland Constitution does not require grand jury indictments for criminal prosecutions.

The history of the rule of double jeopardy is an ancient one, but the governing principles have not substantially changed over the course of time. The most renowned jurists and commentators have expressed their views on

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44. Revised Statutes, Section 1035 provided: "In all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charge: *Provided*, that such attempt be itself a separate offense." 18 Stat. 1035.

the subject, and yet the prevailing view has been in accord with the proposition that we have urged in this brief. The opinion below represents a departure from that tradition, but does not support that anomaly with any explicable reasoning. Inasmuch as neither *Downum* nor *Jorn*, which were relied on by the court below, justify the conclusion reached in the opinion, the judgment should be reversed.

CONCLUSION

For the foregoing reasons, we respectfully request that the opinion of the Court of Appeals for the Seventh Circuit be reversed and that the order of the District Court for the Northern District of Illinois, Eastern Division, dismissing the petition for a writ of habeas corpus as being insufficient upon which to grant relief be affirmed.

Respectfully submitted,

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No. 71-692

In the
Supreme Court of the United States
October Term, 1971

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

vs.

DONALD SOMERVILLE,
Respondent.

(On Writ Of Certiorari To The Court
Of Appeals For The Seventh Circuit)

BRIEF FOR RESPONDENT

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PEOPLE OF THE STATE OF ILLINOIS,

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vs.

DONALD SOMERVILLE,

Respondent.

(On Writ Of Certiorari To The Court
Of Appeals For The Seventh Circuit)

BRIEF FOR RESPONDENT

QUESTION PRESENTED

The question presented is whether a mistrial declared after the impaneling of a jury, upon motion of the prosecution alleging a fatally defective indictment, and over the objection of the defendant, constitutes a bar to reprosecution under the double jeopardy provision of the Fifth Amendment made applicable to the States by the Fourteenth Amendment.

ARGUMENT

I.

IN A JURY TRIAL, JEOPARDY ATTACHES WHEN THE JURY IS IMPANELED.

The Court has made perfectly clear that the point at which jeopardy attaches in a jury trial is the impaneling of the jury. *Downum* v. *United States*, 372 U.S. 734, 735-36 (1963).

The State's attempt to argue that attachment of jeopardy is precluded when the first trial was upon a jurisdictionally defective indictment unless the first trial ended in acquittal as in *Ball* v. *United States*, 163 U.S. 662 (1896) is effectively refuted by *Downum*.

The Court in *Ball*, considering a case which had been tried to a verdict of acquittal, made its determination that jeopardy had attached. However, this is not to say that had the case or trial in *Ball* not developed or progressed as fully as it did, that jeopardy would not have attached. *Ball* had no occasion to determine and definitely did not consider such an issue. Thus, *Ball* does not stand for the proposition that the attachment of jeopardy requires a complete trial and a verdict of acquittal. Indeed, assuming *arguendo* this was the conclusion of *Ball*, that conclusion would necessarily have been overturned by *Downum*.

In *Downum*, as was the circumstance in respondent's trial herein, the case was called, both sides announced ready and the jury was selected and sworn. The extent of court proceedings was identical in this case and

Downum. (The reason stated by the prosecutor for discharging the jury in *Downum*—i.e., that he was not ready to proceed—differed, a difference of no significance). In *Downum*, as here, the impaneled jury was discharged over defendant's objections.

Thus, *Downum* makes it clear that jeopardy attached in respondent's first trial. The Seventh Circuit recognized this fact in its most recent decision herein, 447 F.2d 733, 734 (1971), when it quoted *Green* v. *United States*, 355 U.S. 184, 188 (1957):

> "Moreover, it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again."

II.

THAT THE DISMISSAL OF THE FIRST TRIAL WAS BASED ON AN ALLEGEDLY FATALLY DEFECTIVE INDICTMENT DOES NOT AFFECT THE ATTACHMENT OF JEOPARDY.

The initial point to be made is that the only case which specifically considers the instant issue, *Ball*, is conspicuous by its absence from Argument I of the State's brief which takes the position that a jurisdictionally defective indictment should not bar reprosecution. A reading of *Ball* and of *Benton* v. *Maryland*, 395 U.S. 784 (1969), clearly refutes the State's argument.

In *Ball*, the Court had before it a fact situation legally similar to the instant fact situation. In *Ball*, the first indictment "was fatally defective," id. at 664, as the result

of a legal omission or neglect by the prosecutor. Admittedly, in *Ball*, the proceedings on the original fatal indictment did proceed to a verdict of acquittal. The State is accordingly and understandably limited and forced to attempt to distinguish *Ball* on this factual dissimilarity. Such a distinction is unwarranted in law.

The extent or degree of proceedings in a case, however, is and can be pertinent to a double jeopardy issue only in one respect. The threshold and, for that matter, the only concern a court must have as to the progress or stage reached in the chronology of the case, or trial, is in determining if jeopardy attached. (This was the issue already considered in Argument I). Assuming jeopardy did attach here—a conclusion urged in the preceding argument—the relative stages or development of the case and trial are of no consequence.

Importantly, then, although *Ball* did not reach one of the issues now before the Court—*i.e.*, does jeopardy attach when the jury is selected and sworn—this issue was decided in *Downum*, as developed in our initial argument. For this reason reliance on *Ball* as to *when jeopardy attaches*, as distinct from the issue actually decided by *Ball* relative to the consequence of a "fatally defective" indictment on jeopardy, is misleading and totally unavailing. Accordingly, emphasis on the acquittal in *Ball* is unresponsive to the second issue now before the court—*i.e.*, what consequences, if any, a defective indictment has on whether or not jeopardy attaches.

The fundamental error in the State's argument is its emphasis on the effect of a fatally defective indictment. The consequence of such a fatally defective indictment on the attachment of jeopardy—or rather the lake of consequence— is considered and explained by the Court in *Ball* and in *Benton*.

In *Ball*, despite the fact that the indictment did not allege all the essential elements of the crime for which defendant was tried, the trial upon that defective indictment acted as a former jeopardy barring reprosecution for the same offense. Similarly, in the instant case, the first trial was aborted as a result of the prosecution's failure to allege all the essential elements of the offense charged in the indictment. The conclusion is inescapable that, since jeopardy had attached in the first trial according to the standards announced in *Downum*, reprosecution for the same offense was a violation of respondent's constitutional protection against double jeopardy.

The State attempts to limit the effect of *Ball* by creating a distinction between "void" and "voidable" indictments and making that distinction crucial to an accused's protection against double jeopardy. Even granting that *Ball* suggests the existence of such a distinction and its applicability to double jeopardy situations, the State's argument has recently been rejected by the Court.

In *Benton*, the Court considered and rejected the State of Maryland's contention that, because the indictment upon which the first trial was based was void, the first trial was conducted before a court which was without jurisdiction, thus preventing the attachment of jeopardy. *Id.* at 796-97. Even Mr. Justice Harlan, who dissented, agreed:

> "The State's contention that petitioner's first trial was a complete nullity because the trial court lacked jurisdiction is unconvincing." (*Id.* at 810-11.)

The Court, in *Benton*, implicitly rejecting the use of *Ball* as authority for Maryland's argument, stated that, instead, *Ball* directed the conclusion that Maryland's argument was invalid. *Id.* at 797.

Thus, a reading of *Ball* and of *Benton* lead inevitably to the conclusion that, a fatally defective indictment does not prevent the attachment of jeopardy, and that his conclusion holds true even in the face of an argument urging that the first indictment was "void." Hence, jeopardy did attach, at respondent's first trial, because the jury was impaneled at the time a mistrial was declared, notwithstanding the State's argument that the trial court was "without jurisdiction" and that the indictment was "void".

III.

THE CIRCUMSTANCES SURROUNDING THE DECLARATION OF MISTRIAL DO NOT REVEAL THE MANIFEST NECESSITY NECESSARY TO CREATE AN EXCEPTION TO THE BAR AGAINST REPROSECUTION AFTER JEOPARDY HAS ATTACHED.

There can be no question that the Court has created exceptions to the bar against reprosecution following attachment of jeopardy when the circumstances revealed a "manifest necessity" for the declaration of mistrial. It is also clear that the existence of "manifest necessity" is not lightly to be inferred. As was said in *Downum*, 372 U.S. at 736:

> "The discretion to discharge a jury before it has reached a verdict is to be exercised, only in very extraordinary and striking circumstances, to use the words of Mr. Justice Story in United States v. Coolidge, 25 Fed. Cas. 622, 623.

Accordingly, the following have been found to be circumstances of sufficiently serious magnitude to justify an exception to the protection against double jeopardy: a "hung jury," *Keerl v. Montana*, 213 U.S. 135 (1909); tactical problems confronting an army in the field as affecting a court martial, *Wade v. Hunter*, 336 U.S. 684

(1949); juror bias, *id.*; *Thompson* v. *United States*, 155 U.S. 271 (1894); or where the conduct or motion of the defendant causes the dismissal. *United States* v. *Tateo*, 377 U.S. 463 (1964). However, none of these circumstances exist in the instant case nor do any of the above cases contain any suggestion that prosecutorial negligence would constitute "manifest necessity."

At best, the State's argument would promote the protection of judicial economy—a value of some worth, but not comparable to the constitutional value embodied in a defendant's right to proceed to verdict once a jury has been impaneled.

The State fails to recognize the importance the Court has attached to a defendant's right to be tried by the jury he initially assists in selecting. In *United States* v. *Jorn*, 400 U.S. 470, 484 (1971), the Court pointed out that

> "... the crucial difference between reprosecution after appeal by the defendant and reprosecution after a *sua sponte* judicial mistrial declaration is that in the first situation the defendant has not been deprived of his option to go to the *first* jury and, perhaps, end the dispute then and there with an acquittal. On the other hand, where the judge, acting without the defendants's consent, aborts the proceeding, the defendant has been deprived of his 'valued right to have his trial completed by a *particular* tribunal.' See *Wade* v. *Hunter*, 336 U.S., at 689, 69 S.Ct., at 837." (emphasis added).

Obviously, it matters not to the defendant whether the mistrial was the fault of the judge, as in *Jorn*, or of the prosecution, as in the instant case. In either event, he is deprived of his right to be tried by the jury he first helps select—a right of constitutional magnitude.

In addition to the foregoing, a crucial fact to be noted is that none of these problems would have arisen but for the fault of the prosecution. The Court has not been insensitive to the deprivation of a defendant's rights due to prosecutorial misfeasance. In *Ball*, the Court was most appreciative of the decisive fact that the prosecutor (not the defendant) was responsible for the error in the proceedings, quoting with approval an earlier dissenting opinion of Justice Livingston in *People* v. *Barrett*, 1 *Johns.* 66, 74 (1806):

> "This case, in short, presents the novel and unheard of spectacle, of a public officer, whose business it is to frame a correct bill, openly alleging his own inaccuracy or neglect. That a party should be deprived of the benefit of an acquittal by a jury on a suggestion of this kind, coming too from an officer who drew the indictment, seems not to comport with that universal and human principle of criminal law, 'that no man shall be brought into danger more than once for the same offense.' It is very like permitting a party to take advantage of his own wrong. If that practice be tolerated, when are trials of the accused to end!" (163 U.S. at 667-68.)

The Court, in *Ball*, similarly recognized that there were potential abuses in allowing a prosecutor to take advantage of an inaccurate indictment even before the verdict is reached. The Court once again quoted from *Barrett*, at 74, in a passage equally applicable to a prosecutor who dislikes the first jury selected:

> ". . . Suppose an acquittal [is imminent—even if only in the mind of the prosecutor] . . . the prosecutor, if he be dissatisfied and bent on conviction, has nothing to do but tell the court that his own indictment was good for nothing; that it has no venue, or

> is deficient in other particulars, and that, therefore, he has a right to a second chance of convicting the prisoner, and so on, *toties quoties*." (163 U.S. at 668.)

The Seventh Circuit, in its most recent decision in the instant case, took care to point out that where a mistrial is declared without any affirmative action on the part of the defendant, as in *Downum*, *Jorn* and this case, a double jeopardy claim will be successful. The court then quoted Mr. Chief Justice Burger, 447 F.2d at 735, from his concurring opinion in *Jorn*:

> "If the accused had brought about the erroneous mistrial ruling we would have a different case, but this record shows nothing to take appellee's claims outside the classic mold of being twice placed in jeopardy for the same offense."

CONCLUSION

The only conclusion to be distilled from a reading of *Downum*, *Ball* and *Benton* is that, the drafting of a defective indictment by the prosecutor cannot and does not prevent attachment of jeopardy upon swearing of the jury. *Downum* concludes jeopardy attaches when the jury is sworn. *Ball* concludes a fatally defective indictment does not preclude the attachment of jeopardy. *Benton* rejects any exception based upon the contention that the indictment was "void." This conclusion assumes, as is the fact here, that the defendant did not cause the error in the first proceeding, nor was it upon his motion (or appeal) that the mistrial (or reversal) was declared. It is further urged that prosecutorial error is not that kind of circumstance the Court has held to be "manifest necessity" justifying retrial even though jeopardy has attached.

Respondent thus respectfully prays that the Court will affirm the decision of the Seventh Circuit.

Respectfully submitted,

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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ILLINOIS *v.* SOMERVILLE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 71-692. Argued November 13, 1972—
Decided February 27, 1973

Respondent was brought to trial under an indictment which, it developed before any evidence was presented, contained a defect that under Illinois law could not be cured by amendment and that on appeal could be asserted to overturn any judgment of conviction. The trial judge declared a mistrial over respondent's objection, following which respondent was reindicted, tried, and convicted. He thereafter petitioned for habeas corpus, which was ultimately granted on the ground that jeopardy having attached when the jury was initially impaneled and sworn, the second trial constituted double jeopardy. *Held:* Under the circumstances of this case, the trial judge's action in declaring a mistrial was a rational determination designed to implement a legitimate state policy, with no suggestion that the policy was manipulated to respondent's prejudice. The declaration of a mistrial was therefore required by "manifest necessity" and the "ends of public justice," and the Double Jeopardy Clause of the Fifth Amendment as made applicable to the States by the Fourteenth did not bar respondent's retrial. Pp. 3–13.

447 F. 2d 733, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and POWELL, JJ., joined. WHITE, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined. MARSHALL, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-992

State of Illinois, Petitioner,
v.
Donald Somerville.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February 27, 1973]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We must here decide whether declaration of a mistrial over the defendant's objection because the trial court concluded that the indictment was insufficient to charge a crime, necessarily prevents a State from subsequently trying the defendant under a valid indictment. We hold that the mistrial met the "manifest necessity" requirement of our cases, since the trial court could reasonably have concluded that the "ends of public justice" would be defeated by having allowed the trial to continue. Therefore the Double Jeopardy Clause of the Fifth Amendment, made applicable to the States through the Due Process Clause of the Fourteenth Amendment, *Benton v. Maryland*, 395 U. S. 784 (1969), did not bar trial under a valid indictment.

I

On March 19, 1964, respondent was indicted by an Illinois grand jury for the crime of theft. The case was called for trial and a jury impaneled and sworn on November 1, 1965. The following day, before any evidence had been presented, the prosecuting attorney realized that the indictment was fatally deficient under Illinois law because it did not allege that respondent intended to

permanently deprive the owner of his property. Under the applicable Illinois criminal statute, such intent is a necessary element of the crime of theft,[1] and failure to allege intent renders the indictment insufficient to charge a crime. But under the Illinois Constitution,[2] an indictment is the sole means by which a criminal proceeding such as this may be commenced against a defendant. Illinois further provides that only formal defects, of which this was not one, may be cured by amendment. The combined operation of these rules of Illinois procedure and substantive law meant that the defect in the indictment was "jurisdictional"; it could not be waived by the defendant's failure to object, and could be asserted on appeal or in a post-conviction proceeding to overturn a final judgment of conviction.

Faced with this situation, the Illinois trial court concluded that further proceedings under this defective indictment would be useless and granted the State's motion for a mistrial. On November 3, the grand jury handed down a second indictment alleging the requisite intent. Respondent was arraigned two weeks after the first trial was aborted, raised a claim of double jeopardy which was overruled, and the second trial commenced shortly thereafter. The jury returned a verdict of guilty, sentence was imposed, and the Illinois courts upheld the conviction. Respondent then sought federal habeas corpus, alleging that the conviction constituted double jeopardy contrary to the prohibition of the Fifth and Fourteenth Amendments. The Seventh Circuit affirmed the denial of habeas corpus prior to our decision in *United States* v. *Jorn*, 400 U. S. 470 (1971). The respondent's petition for certiorari was granted, and the

[1] Ill. Rev. Stat. 1965, c. 38, § 16–1 (a) (1).

[2] See Constitution of Illinois, Art. II, § 8. When the State Constitution was amended in 1970, this provision was retained as Art. I, § 7.

case remanded for reconsideration in light of *Jorn* and *Downum* v. *United States*, 372 U. S. 734 (1963). On remand, the Seventh Circuit held that respondent's petition for habeas corpus should have been granted because, although he had not been tried and *acquitted* as in *United States* v. *Ball*, 163 U. S. 662 (1896), and *Benton* v. *Maryland*, 395 U. S. 794 (1969), jeopardy had attached when the jury was impaneled and sworn, and a declaration of mistrial over respondent's objection precluded a retrial under a valid indictment. For the reasons stated below, we reverse that judgment.

II

The fountainhead decision construing the Double Jeopardy Clause in the context of a declaration of a mistrial over a defendant's objection is *United States* v. *Perez*, 9 Wheat. (22 U. S.) 579 (1824). Mr. Justice Story, writing for a unanimous Court, set forth the standards for determining whether a retrial, following a declaration of a mistrial over a defendant's objection, constitutes double jeopardy within the meaning of the Fifth Amendment. In holding that the failure of the jury to agree on a verdict of either acquittal or conviction did not bar retrial of the defendant, Mr. Justice Story wrote:

> "We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious cases; and, in capital

cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office." *Id.*, at 580.

This formulation, consistently adhered to by this Court in subsequent decisions, abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial. The broad discretion reserved to the trial judge in such circumstances has been consistently reiterated in decisions of this Court. In *Wade* v. *Hunter*, 336 U. S. 690 (1949), the Court, in reaffirming this flexible standard, wrote:

"We are asked to adopt the *Cousins* rule under which petitioner contends the absence of witnesses can never justify discontinuance of the trial. Such a rigid formula is inconsistent with the guiding principles of the *Perez* decision to which we adhere. Those principles command courts in considering whether a trial should be terminated without judgment to take 'all circumstances into account' and thereby forbid the mechanical application of an abstract formula. The value of the *Perez* principle thus lies in a capacity for informed application under widely different circumstances without injury to the defendants under the public interest." *Id.*, at 691.

Similarly, in *Gori* v. *United States*, 367 U. S. 364 (1961), the Court again underscored the breadth of a trial judge's discretion, and the reasons therefor, to declare a mistrial.

"Where for reasons deemed compelling by the trial judge, who is best situated intelligently to make

such a decision, the ends of substantial justice cannot be obtained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment." *Id.*, at 368.

In reviewing the propriety of the trial judge's exercise of his discretion, this Court, following the counsel of Mr. Justice Story, has scrutinized the action to determine whether, in the context of that particular trial, the declaration of a mistrial was dictated by "manifest necessity" or the "ends of public justice." The interests of the public in seeing that a criminal prosecution proceed to verdict, either of acquittal or conviction, need not be forsaken by the formulation or application of rigid rules that necessarily preclude the vindication of that interest. This consideration, whether termed the "ends of public justice," *United States* v. *Perez*, *supra*, at 580, or, more precisely, "the public's interest in fair trials designed to end in just judgments," *Wade* v. *Hunter*, *supra*, at 689, has not been disregarded by this Court.

In *United States* v. *Perez*, *supra*, and *Logan* v. *United States*, 144 U. S. 263 (1892), this Court held that "manifest necessity" justified the discharge of juries unable to reach verdicts, and therefore the Double Jeopardy Clause did not bar retrial. Cf. *Keerl* v. *Montana*, 213 U. S. 135 (1909); *Dreyer* v. *Illinois*, 187 U. S. 71 (1902). In *Simmons* v. *United States*, 142 U. S. 148 (1891), a trial judge dismissed the jury, over defendant's objection, because one of the jurors had been acquainted with the defendant, and therefore was probably prejudiced against the Government; this Court held that the trial judge properly exercised his power "to prevent the defeat of the ends of justice." In *Thompson* v. *United States*, 155 U. S. 271 (1894), a mistrial was declared after the trial judge learned that one of the jurors was disqualified, he having

been a member of the grand jury that indicted the defendant. Similarly, in *Lanza v. New Mexico*, 242 U. S. 199 (1916), the defendant demurred to indictment, his demurrer was overruled and a jury sworn. The district attorney, realizing that the defendant had not pleaded to the indictment after the demurrer had been overruled, moved for the discharge of the jury and arraignment of the defendant for pleading; the jury was discharged, the defendant pleaded not guilty, the same jury was again impaneled, and a verdict of guilty rendered. In both of these cases this Court held that the Double Jeopardy Clause did not bar reprosecution.

While virtually all of the cases turn on the particular facts and thus escape meaningful categorization, see *Gori v. United States*, *supra*, *Wade v. Hunter*, *supra*, it is possible to distill from them a general approach, premised on the "public justice" policy enunciated in *United States v. Perez*, to situations such as that presented by this case. A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial. If an error would make reversal on appeal a certainty, it would not serve "the ends of public justice" to require that the Government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court. This was substantially the situation in both *Thompson v. United States*, *supra*, and *Lovato v. New Mexico*, *supra*. While the declaration of a mistrial on the basis of a rule or a defective procedure that lent itself to prosecutorial manipulation would involve an entirely different question, cf. *Downum v. United States*, *supra*, such was not the situation in the above cases or in the instant case.

In *Downum v. United States*, *supra*, the defendant was charged with six counts of mail theft and forging and

uttering stolen checks. A jury was selected and sworn in the morning, and instructed to return that afternoon. When the jury returned, the Government moved for the discharge of the jury on the ground that a key prosecution witness, for two of the six counts against defendant, was not present. The prosecution knew, prior to the selection and swearing of the jury, that this witness could not be found and had not been served with a subpoena. The trial judge discharged the jury over the defendant's motions to dismiss two counts for failure to prosecute and to continue the other four. This Court, in reversing the convictions on the ground of double jeopardy, emphasized that "[e]ach case must turn on its facts," 372 U. S., at 787, and held that the second prosecution constituted double jeopardy, because the absence of the witness and the reason therefor did not there justify, in terms of "manifest necessity," the declaration of a mistrial.

In *United States* v. *Jorn*, *supra*, the Government called a taxpayer witness in a prosecution for willfully assisting in the preparation of fradulent income tax returns. Prior to his testimony, defense counsel suggested he be warned of his constitutional right against compulsory self-incrimination. The trial judge warned him of his rights, and the witness stated that he was willing to testify and that the IRS agent who first contacted him warned him of his rights. The trial judge, however, did not believe the witness' declaration that the IRS had so warned him, and refused to allow him to testify until after he had consulted with an attorney. After learning from the Government that the remaining four witnesses were "similarly situated," and after surmising that they too had not been properly informed of their rights, the trial judge declared a mistrial to give the witnesses the opportunity to consult with attorneys. In sustaining a plea in bar of double jeopardy to an attempted second trial of the defendant, the plurality opinion of the Court,

emphasizing the importance to the defendant of proceeding before the first jury sworn, concluded:

"It is apparent from the record that no consideration was given to the possibility of a trial continuance. Indeed, the trial judge acted so abruptly in discharging the jury that, had the prosecutor been disposed to suggest a continuance, or the defendant to object to the discharge of the jury, there would have been no opportunity to do so. When one examines the circumstances surrounding the discharge of this jury, it seems abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the *sua sponte* declaration of this mistrial. *United States* v. *Perez*, 9 Wheat., at 580. Therefore, we must conclude that in the circumstances of this case, appellee's reprosecution would violate the double jeopardy provision of the Fifth Amendment." 400 U. S., at 487.

III

Respondent advances two arguments to support the conclusion that the Double Jeopardy Clause precluded the second trial in the instant case. The first is, that since *United States* v. *Ball*, 163 U. S. 662 (1896), held that jeopardy obtained even though the indictment upon which the defendant was first acquitted had been defective, and since *Downum* v. *United States*, *supra*, held that jeopardy "attaches" when a jury has been selected and sworn, the Double Jeopardy Clause precluded the State from instituting the second proceeding that resulted in respondent's conviction. Alternatively, respondent argues that our decision in *United States* v. *Jorn*, *supra*, which respondent interprets as narrowly limiting the circumstances in which a mistrial is mani-

fatly necessary, requires affirmance. Emphasizing the "'valued right to have his trial completed by a particular tribunal,'" *United States* v. *Jorn*, *supra*, at 484, quoting *Wade* v. *Hunter*, 336 U. S., at 689, respondent contends that the circumstances did not justify depriving him of that right.

Respondent's first contention is precisely the type of rigid, mechanical rule which the Court had eschewed since the seminal decision in *Perez*. The major premise of the syllogism—that trial on a defective indictment precludes retrial—is not applicable to the instant case because it overlooks a crucial element of the Court's reasoning in *United States* v. *Ball*, *supra*. There three men were indicted and tried for murder; two were convicted by a jury and one acquitted. This Court reversed the convictions on the ground that the indictment was fatally deficient in failing to allege that the victim died within a year and a day of the assault. *Ball* v. *United States*, 140 U. S. 118 (1891). A proper indictment was returned and the Government retried all three of the original defendants; that trial resulted in the conviction of all. This Court reversed the conviction of the one defendant who originally had been acquitted, sustaining his plea of double jeopardy. But the Court was obviously and properly influenced by the fact that the first trial had proceeded to verdict. This focus of the Court is reflected in the opinion:

> "[W]e are unable to resist the conclusion that a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict is insufficient in that respect, is a bar to a second indictment for the same killing. . . .
>
> "[T]he accused, *whether convicted or acquitted*, is equally put in jeopardy at the first trial. . . ." 163 U. S., at 669 (emphasis added).

In *Downum*, the Court held, as respondent argues, that jeopardy "attached" when the first jury was selected and sworn. But in cases in which a mistrial has been declared prior to verdict, the conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial. That, indeed, was precisely the rationale of *Perez* and subsequent cases. Only if jeopardy has attached is a court called upon to determine whether the declaration of a mistrial was required by "manifest necessity" or the "ends of public justice."

We believe that in light of the State's established rules of criminal procedure the trial judge's declaration of a mistrial was not an abuse of discretion. Since this Court's decision in *Benton* v. *Maryland*, *supra*, federal courts will be confronted with such claims that arise in large measure from the often diverse procedural rules existing in the 50 States. Federal courts should not be quick to conclude that simply because a state procedure does not conform to the corresponding federal statute or rule, it does not serve a legitimate state policy. Last Term, recognising this fact, we dismissed a writ of certiorari as improvidently granted in a case involving a claim of double jeopardy stemming from the dismissal of an indictment under the "rules of criminal pleading peculiar to" an individual State followed by a retrial under a proper indictment. *Duncan* v. *Tennessee*, 405 U. S. 127 (1972).

In the instant case, the trial judge terminated the proceeding because a defect was found to exist in the indictment that was, as a matter of Illinois law, not curable by amendment. The Illinois courts have held that even after a judgment of conviction has become final, the defendant may be released on habeas corpus, because the defect in the indictment deprives the trial court of "jurisdiction." The rule prohibiting the amendment

of all but formal defects in indictments is designed to implement the State's policy of preserving the right of each defendant to insist that a criminal prosecution against him commenced by the action of a grand jury. The trial judge was faced with a situation similar to those in *Simmons*, *Lovato*, and *Thompson*, in which a procedural defect might or would preclude the public from either obtaining an impartial verdict or keeping a verdict of conviction if its evidence persuaded the jury. If a mistrial were constitutionally unavailable in situations such as this, the State's policy could only be implemented by conducting a second trial after verdict and reversal on appeal, thus wasting time, energy, and money for all concerned. Here the trial judge's action was a rational determination designed to implement a legitimate state policy, with no suggestion that the implementation of that policy in this manner could be manipulated so as to prejudice the defendant. This situation is thus unlike *Downum*, where the mistrial entailed not only a delay for the defendant, but also operated as a post-jeopardy continuance to allow the prosecution an opportunity to strengthen its case. Here the delay was minimal, and the mistrial was, under Illinois law, the only way in which a defect in the indictment could be corrected. Given the established standard of discretion set forth in *Perez*, *Gori*, and *Hunter*, we cannot say that the declaration of a mistrial was not required by "manifest necessity" and the "ends of public justice."

Our decision in *Jorn*, relied upon by the court below and respondent, does not support the opposite conclusion. While it is possible to excise various portions of the plurality opinion to support the result reached below, divorcing the language from the facts of the case serves only to distort its holdings. That opinion dealt with action by a trial judge that can fairly be described as

erratic. The Court held that the lack of apparent harm to the defendant from the declaration of a mistrial did not itself justify the mistrial, and concluded that there was no "manifest necessity" for the mistrial, as opposed to less drastic alternatives. The Court emphasized that the absence of any manifest need for the mistrial had deprived the defendant of his right to proceed before the first jury, but it did not hold that that right may never be forced to yield, as in this case, to "the public's interest in fair trials designed to end in just judgments." The Court's opinion in *Jorn* is replete with approving references to *Wade v. Hunter*, *supra*, which latter case stated:

> "The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict. In such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again. And there have been instances where a trial judge has discovered facts during a trial which indicated that one or more members of the jury might be biased against the Government or the defendant. It is settled that the duty of the judge in this event is to discharge the jury and direct a retrial. *What has been said is enough to show that a defendant's valued right to have his trial completed by a par-*

ticular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." Wade v. Hunter, 336 U. S., at 688–689 (footnote omitted; emphasis added).

The determination by the trial court to abort a criminal proceeding where jeopardy has attached is not one to be lightly undertaken, since the interest of the defendant in having his fate determined by the jury first impaneled is itself a weighty one. *United States* v. *Jorn, supra.* Nor will the lack of demonstrable additional prejudice preclude the defendant's invocation of the double jeopardy bar in the absence of some important countervailing interest of proper judicial administration. *Ibid.* But where the declaration of a mistrial implements a reasonable state policy and aborts a proceeding that at best would have produced a verdict that could have been upset at will by one of the parties, the defendant's interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public justice. *Wade* v. *Hunter, supra.*

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 71-602

State of Illinois, Petitioner,
v.
Donald Somerville,

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February 27, 1973]

MR. JUSTICE WHITE, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

For the purposes of the Double Jeopardy Clause, jeopardy attaches when a criminal trial commences before judge or jury, *United States* v. *Jorn*, 400 U. S. 470, 479-480 (1971); *Green* v. *United States*, 355 U. S. 184, 188 (1957); *Wade* v. *Hunter*, 336 U. S. 684, 688 (1949), and this point has arrived when a jury has been selected and sworn, even though no evidence has been taken. *Downum* v. *United States*, 372 U. S. 734 (1963). Clearly, Somerville was placed in jeopardy at his first trial despite the fact that the indictment against him was defective under Illinois law. *Benton* v. *Maryland*, 395 U. S. 784, 796-797 (1969); *United States* v. *Ball*, 163 U. S. 662 (1896). The question remains, however, whether the facts of this case present one of those circumstances where a trial, once begun, may be aborted over the defendant's objection and the defendant retried without twice being placed in jeopardy contrary to the Constitution.

The Court has frequently addressed itself to the general problem of mistrials and the Double Jeopardy Clause, most recently in *United States* v. *Jorn*, *supra*. We have abjured mechanical, *per se* rules and have preferred to rely upon the approach first announced in *United States* v. *Perez*, 22 U. S. (9 Wheat.) 579 (1824). Under the *Perez* analysis, a trial court has authority to discharge

a jury prior to verdict, and the Double Jeopardy Clause will not prevent retrial, only if the trial court takes "all of the circumstances into consideration" and in its "sound discretion" determines that "there is manifest necessity for the act, or the ends of public justice would be defeated." *Id.*, at 580. See also *United States* v. *Jorn*, *supra*, at 483–481 (opinion of Harlan, J.); *id.*, at 492 (STEWART, J., dissenting); *Gori* v. *United States*, 367 U. S. 364, 367–369 (1961); *id.*, at 370–373 (DOUGLAS, J., dissenting); *Downum* v. *United States*, *supra*, at 735–736; *id.*, at 740 (Clark, J., dissenting). Despite the generality of the *Perez* standard, some guidelines have evolved from past cases, as this Court has reviewed the exercise of trial court discretion in a variety of circumstances.

United States v. *Jorn*, *supra*, and *Downum* v. *United States*, *supra*, for example, make it abundantly clear that trial courts should have constantly in mind the purposes of the Double Jeopardy Clause to protect the defendant from continued exposure to embarrassment, anxiety, expense, and restrictions on his liberty, as well as to preserve his "'valued right to have his trial completed by a particular tribunal.'" *United States* v. *Jorn*, *supra*, at 484, quoting from *Wade* v. *Hunter*, 336 U. S., at 689.

> "[I]n the final analysis, the judge must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *United States* v. *Jorn*, *supra*, at 486.

It was in light of this interest that the Court in *Downum* reversed a conviction on double jeopardy grounds where a mistrial was declared to permit further efforts to secure the attendance of a key prosecution witness who should

have been, but was not, subpoenaed. Although no prosecutorial misconduct other than mere oversight and mistake was claimed or proved, the policies of the Double Jeopardy Clause, and the interest of the defendant in taking his case to the jury that he had just accepted, were sufficient to raise the double jeopardy barrier to a second trial.

Similarly, in *Jorn*, a trial was terminated when the trial judge, *sua sponte* and mistakenly, declared a mistrial, apparently to protect nonparty witnesses from the possibility of self-incrimination. There was no showing of intent by the prosecutor or the judge to harass the defendant or to enhance chances of conviction at a second trial; the defendant was given a complete preview of the Government's case, and no specific prejudice to the defense at a second trial was shown. Noting that the courts "must bear in mind the potential risks of abuse by the defendant of society's unwillingness to unnecessarily subject him to repeated prosecutions," 400 U. S., at 486, this Court held that the defendant's interest in submitting his case to the initial jury was itself sufficient to invoke the Double Jeopardy Clause and, as in *Downum*, to override the Government's concern with enforcing the criminal laws by having another chance to try the defendant for the crime with which he was charged. In neither case was there "manifest necessity" for a mistrial and a double trial of the defendant.

Very similar considerations govern this case. Somerville asserts a right to but one trial and to a verdict by the initial jury. A mistrial was directed at the instance of the State, over Somerville's objection, and was occasioned by official error in drafting the indictment—error unaccompanied by bad faith, overreaching, or specific prejudice to the defense at a later trial. The State may no more try the defendant a second time in these circumstances than could the United States in

Downum and *Jorn*. Although the exact extent of the emotional and physical harm suffered by Somerville during the period between his first and second trial is open to debate, it cannot be gainsaid that Somerville lost "his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal." *United States* v. *Jorn*, 400 U. S., at 484. *Downum* and *Jorn*, over serious dissent, rejected the view that the Double Jeopardy Clause protects only against those mistrials that lend themselves to prosecutorial manipulation and underwrote the independent right of a defendant in a criminal case to have the verdict of the initial jury. Both cases made it quite clear that the discretion of the trial court to declare mistrials is reviewable and that the defendant's right to a verdict by his first jury is not to be overridden except for "manifest necessity." There was not, in this case any more than in *Downum* and *Jorn*, "manifest necessity" for the loss of that right.

The majority recognizes that "the interest of the defendant in having his fate determined by the jury first impaneled is itself a weighty one," but finds that interest outweighed by the State's desire to avoid "conducting a second trial after verdict and reversal on appeal [on the basis of a defective indictment], thus wasting time, energy, and money for all concerned." The majority finds paramount the interest of the State in "keeping a verdict of conviction if its evidence persuaded the jury." Such analysis, however, completely ignores the possibility that the defendant might be acquitted by the initial jury. It is, after all, that possibility—the chance to "end the dispute then and there with an acquittal," *ibid.*—that makes the right to a trial before a particular tribunal of importance to a defendant. In addition, the majority's balancing gives too little weight to the fundamental place of the Double Jeopardy Clause, and the purposes which it seeks to serve, in "the framework of procedural

protections which the Constitution establishes for the conduct of a criminal trial." *Id.*, at 479.

Apparently the majority finds "manifest necessity" for a mistrial and the retrial of the defendant in "the State's policy of preserving the right of each defendant to insist that a criminal prosecution against him be commenced by the action of a grand jury" and the implementation of that policy in the absence from Illinois procedural rules of any procedure for the amendment of indictments. Conceding the reasonableness of such a policy, it must be remembered that the inability to amend an indictment does not come into play, and a mistrial is not necessitated, unless an error on the part of the State in the framing of the indictment is committed. Only when the indictment is defective—only when the State has failed to properly execute its responsibility to frame a proper indictment—does the State's procedural framework necessitate a mistrial.

Although recognizing that "a criminal trial is, even in the best of circumstances, a complicated affair to manage," *id.*, the Court has not thought prosecutorial error sufficient excuse for not applying the Double Jeopardy Clause. In *Jorn*, for instance, the Court declared that "unquestionably an important factor to be considered is the need to hold litigants on both sides to standards of responsible professional conduct in the clash of an adversary criminal process" and cautioned, "The trial judge must recognize that lack of preparedness by the Government . . . directly implicates policies underpinning both the double jeopardy provision and the speedy trial guarantee." *Id.*, at 486. *See also id.*, at 487–488 (BURGER, C. J., concurring); *Downum* v. *United States*, 372 U. S., at 737. Here, the prosecutorial error, not the independent operation of a state procedural rule, necessitated the mistrial. Judged by the standards of *Downum* and *Jorn* I cannot find, in the words of the majority, an

"important countervailing interest of proper judicial administration" in this case; I cannot find "manifest necessity" for a mistrial to compensate for prosecutorial mistake.

Finally, the majority notes that "the declaration of a mistrial on the basis of a rule or a defective procedure that lent itself to prosecutorial manipulation would involve an entirely different question." See *United States* v. *Jorn*, 400 U. S., at 479; *Downum* v. *United States*, *supra*; *Green* v. *United States*, 355 U. S., at 187–188. Surely there is no evidence of bad faith or overreaching on this record. However, the words of the Court in *Ball* seem particularly appropriate.

> "This case, in short, presents the novel and unheard of spectacle, of a public officer, whose business it was to frame a correct bill, openly alleging his own inaccuracy or neglect, as a reason for a second trial, when it is not pretended that the merits were not fairly in issue on the first . . . . If this practice be tolerated, when are trials of the accused to end? If a conviction takes place, whether an indictment be good, or otherwise, it is ten to one that judgment passes; for, if he read the bill, it is not probable he will have penetration enough to discern its defects. His counsel, if any be assigned to him, will be content with hearing the substance of the charge without looking further; and the court will hardly, of its own accord, think it a duty to examine the indictment to detect errors in it. Many hundreds, perhaps, are now in the state prison on erroneous indictments, who, however, have been fairly tried on the merits." 163 U. S., at 667–68.

I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

No. 71-692

State of Illinois, Petitioner,
v.
Donald Somerville.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February 27, 1973]

MR. JUSTICE MARSHALL, dissenting.

The opinion of the Court explicitly disclaims the suggestion that it overrules the recent cases of *United States* v. *Jorn*, 400 U. S. 470 (1971), and *Downum* v. *United States*, 372 U. S. 734 (1963). *Ante*, at —. But the Court substantially eviscerates the rationale of those cases. *Jorn* and *Downum* appeared to give judges some guidance in determining what constituted a "manifest necessity" for declaring a mistrial over a defendant's objection. Today the Court seems to revert to a totally unstructured analysis of such cases. I believe that one of the strengths of the articulation of legal rules in a series of cases is that successive cases present in a clearer focus considerations only vaguely seen earlier. Cases help delineate the factors to be considered and suggest how they ought to affect the result in particular situations. That is what *Jorn* and *Downum* did. The Court, it seems to me, today abandons the effort in those cases to suggest the importance of particular factors, and adopts a general "balancing" test which, even on its own terms, the Court improperly applies to this case.

The majority purports to balance the manifest necessity for declaring a mistrial, *ante*, at —, the public interest "in seeing that a criminal prosecution proceed to verdict," *ante*, at —, and the interest in assuring impartial verdicts, *ante*, at —. The second interest is

obviously present in every case, and placing it in the balance cannot alter the result of the analysis of different cases. It is, at most, a constant whose importance a judge must consider when weighing other factors on which the availability of the double jeopardy defense depends.

At the same time, the balance that the majority strikes essentially ignores the importance of a factor which was determinative in *Jorn* and *Downum*: the accused's interest in his "valued right to have his trial completed by a particular tribunal," *Wade* v. *Hunter*, 336 U. S. 684, 689 (1949), quoted in *United States* v. *Jorn*, 400 U. S., at 484. This is not a factor which is excised from isolated passages of *Jorn*, as the majority would have it, *ante*, at ——; it is the core of that case, as even the most cursory reading will disclose. See, *e. g.*, 400 U. S., at 479, 484–486.

By mischaracterizing *Jorn* and *Downum*, the Court finds it possible to reach today's result. A fair reading of those cases shows how the balance should properly be struck here. The first element to be considered is the necessity for declaring a mistrial. That I take to mean consideration of the alternatives available to the judge confronted with a situation in the midst of trial that seems to require correction. In *Downum*, for example, a key prosecution witness was not available when the case was called for trial, because of the prosecutor's negligence. Because the witness was essential to presentation of only two of the six counts concerning *Downum*, there was no necessity to declare a mistrial as to all six. Trial could have proceeded on the four counts for which the prosecution was ready. *Downum* v. *United States*, 372 U. S., at 737. Similarly, in *Jorn*, the District Judge precipitously aborted the trial in order to protect the rights of prospective witnesses. Again, the alternative

of interrupting the trial briefly so that the witnesses might consult with attorneys was available but not invoked. *United States* v. *Jorn*, 400 U. S., at 487.

A superficial examination of this case might suggest that there were no alternatives except to proceed where "reversal on appeal [would be] a certainty" *ante*, at ___. Respondent had been indicted for "knowingly obtain[ing] unauthorized control over stolen property, to wit, thirteen hundred dollars in United States Currency, the property of Zayre of Bridgeview, Inc., a corporation, knowing the same to have been stolen by another in violation of Chapter 38, Section 16–1 (d) of the Illinois Revised Statutes." Petition for Writ of Certiorari, at 3. The statute named in the indictment requires that the defendant have "intend[ed] to deprive the owner permanently of the use or benefit of the property." Ill. Rev. Stat. c. 38, § 16–1 (d)(1) (1963).

The majority treats it as unquestionably clear that the failure to allege that intent in the indictment made the indictment fatally defective. And indeed, since the time of trial Illinois courts have so held. *See, e. g., People* v. *Matthews*, 122 Ill. App. 2d 264, 258 N. E. 2d 378 (1970); *People* v. *Hayn*, 116 Ill. App. 2d 241, 253 N. E. 2d 575 (1969). But the answer was not so clear when the trial judge made his decision. The Illinois Code of Criminal Procedure had just recently been amended to require that an indictment name the offense and the statutory provision alleged to have been violated, and that it set forth the nature and elements of the offense charged. Ill. Rev. Stat. c. 38, § 111–3 (a) (1963). The indictment here was sufficiently detailed to meet the federal requirement that the indictment "contain the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet,'"

Hagner v. *United States*, 285 U. S. 427, 431 (1932); see also *Russell* v. *United States*, 369 U. S. 749 (1962).

Had the Illinois courts been made aware of the substantial constitutional questions raised by rigid application of an archaic mode of reading indictments, they might well have refused to hold that the defect in the indictment here was jurisdictional and nonwaivable. Conscientious state trial judges certainly must attempt to anticipate the course of interpretation of state law. But they must also contribute to that course by pointing out the constitutional implications of alternative interpretations. By doing so, they would themselves help shape the interpretation of state law. Here, for example, had the trial judge refused to declare a mistrial because of his constitutional misgivings about the implications of that course, he might have prevented what Chief Justice Underwood has called a "reversion to an overly technical, highly unrealistic and completely undesirable type of formalism in pleading . . . which serves no useful purpose," in interpreting the Code of Criminal Procedure. *People ex rel. Ledford* v. *Brantley*, 46 Ill. 2d 419, 263 N. E. 2d 27 (1970) (Underwood, C. J., dissenting). A trial judge in 1965 might have forestalled that unhappy development. Thus, he could have proceeded to try the case on the first indictment, risking reversal as any trial judge does when making rulings of law, but with no guarantee of reversal. In proceeding with the trial, he would have fully protected the defendant's interest in having his trial completed by the jury already chosen.

If the only alternative to declaring a mistrial did require the trial judge to ignore the tenor of previous state decisional law, though, perhaps declaring a mistrial would have been a manifest necessity. But there obviously was another alternative. The trial judge could have continued

the trial. The majority suggests that this would have been a useless charade. But to a defendant, forcing the Government to proceed with its proof would almost certainly not be useless. The Government might not persuade the jury of the defendant's guilt. The majority concedes that the Double Jeopardy Clause would then bar a retrial. *Ante*, at —; *United States* v. *Ball*, 163 U. S. 662 (1896). To assume that continuing the trial would be useless is to assume that conviction is inevitable. I would not structure the analysis of problems under the Double Jeopardy Clause on an assumption that appears to be inconsistent with the presumption of innocence.

Once it is shown that alternatives to the declaration of a mistrial existed, as they did here, we must consider whether the reasons which led to the declaration were sufficient, in light of those alternatives, to overcome the defendant's interest in trying the case to the jury. Here *Jorn* and *Downum* run directly counter to the holding today.

I would not characterize the District Judge's behavior in *Jorn* as "erratic," as the Court does, *ante*, at —. His desire to protect the rights of prospective witnesses, who might have unknowingly implicated them in criminal activities if they testified, was hardly irrational. It, too, was "a legitimate state policy." *Ante*, at —. The defect in *Jorn* was the District Judge's failure to consider alternative courses of action, not the irrationality of the policy he sought to promote.

But even if I agreed with the majority's description of *Jorn*, that would not end the inquiry. I would turn to a consideration of the importance of the state policy that seemed to require declaring a mistrial, when weighed against the defendant's interest in concluding the trial with the jury already chosen.

Here again the majority mischaracterizes the state policy at stake here. What is involved is not, as the

majority says, "the right of each defendant to insist that a criminal prosecution against him be commenced by the action of a grand jury." *Ante*, at —. Rather, the interest is in making the defect in the indictment here jurisdictional and not waivable by a defendant. Ordinarily, a defect in jurisdiction means that one institution has invaded the proper province of another. Such defects are not waivable because the State has an interest in preserving the allocation of competence between those institutions. Here, for example, the petty jury would invade the province of the grand jury if it returned a verdict of guilty on an improper indictment. However, allocation of jurisdiction is most important when one continuing body acts in the area of competence reserved to another continuing body. While it may be desirable to keep a single petty jury from invading the province of a single grand jury, surely that interest is not so substantial as to outweigh the "defendant's valued right to have his trial completed by a particular tribunal." *Wade* v. *Hunter*, 336 U. S. 684, 689 (1949). Cf. *Henry* v. *Mississippi*, 379 U. S. 443 (1965).

Downum v. *United States*, 372 U. S. 734 (1963), is an even harder case for the majority, which succeeds in distinguishing it only by misrepresenting the facts of the case. The majority treats *Downum* as a case involving a procedure "that lent itself to the possibility of prosecutorial manipulation." *Ante*, at —. However, the facts in *Downum*, set out at 372 U. S., at 740–742, clearly show that the prosecutor's failure to have a crucial witness present was a negligent oversight. Except in the most attenuated sense that it may induce a prosecutor to fail to take steps to prevent such oversights, I cannot understand how negligence lends itself to manipulation. And even if I could understand that, I cannot understand how negligence in failing to draw an adequate

indictment is different from negligence in failing to assure the presence of a crucial witness.[1]

I believe that *Dotsman* and *Jorn* are controlling.[2] As in those cases, the trial judge here did not pursue an available alternative, and the reason which led him to declare a mistrial was prosecutorial negligence, a reason that this Court found insufficient in *Downum*. *Jorn* and *Downum* were in the tradition of elaboration of rules which give increasing guidance as case after case is de-

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[1] *Downum* may perhaps be read as stating a prophylactic rule. While the evil to be avoided is the intentional manipulation by the prosecutor of the availability of his witnesses, it may be extremely difficult to secure a determination of intentional manipulation. Proof will inevitably be hard to come by. And the relations between judges and prosecutors in many places may make judges reluctant to find intentional manipulation. Thus, a general rule that the absence of crucial prosecution witnesses is not a reason for declaring a mistrial is necessary. Although the abuses of misdrawing indictments are less apparent than those of manipulating the availability of witnesses, I believe that, even if *Downum* is based on the foregoing analysis—an analysis which appears nowhere in the opinion—a similar prophylactic rule is desirable here.

For example, in this case the State gained two weeks to strengthen a weak case. This is far longer than the two-day delay in *Downum*, and, to the extent that the time was used to strengthen the case, the prosecutor could have capitalized on his previous negligence in drawing the indictment.

[2] So far I have read *Jorn* and *Downum* as restrictively as they can be fairly read. But those cases, I believe, should be read more expansively. They show to me that "manifest necessity" cannot be created by errors on the part of the prosecutor or judge; it must arise from some source outside their control. *Wade* v. *Hunter*, *supra*, was clearly such a case. So were the cases that the majority says involved situations where "an impartial verdict cannot be reached," *ante*, at ——. In those cases, a juror or the jury as a whole, uncontrolled by the judge or prosecutor, prevented the trial from proceeding to a verdict. *United States* v. *Perez*, 9 Wheat. 579 (1824); *Simmons* v. *United States*, 142 U. S. 148 (1891); *Thompson* v. *United States*, 155 U. S. 271 (1894).

cided. I see no reason to abandon that tradition in this case and to adopt a new balancing test whose elements are stated on such a high level of abstraction as to give judges virtually no guidance at all in deciding subsequent cases. I therefore respectfully dissent.